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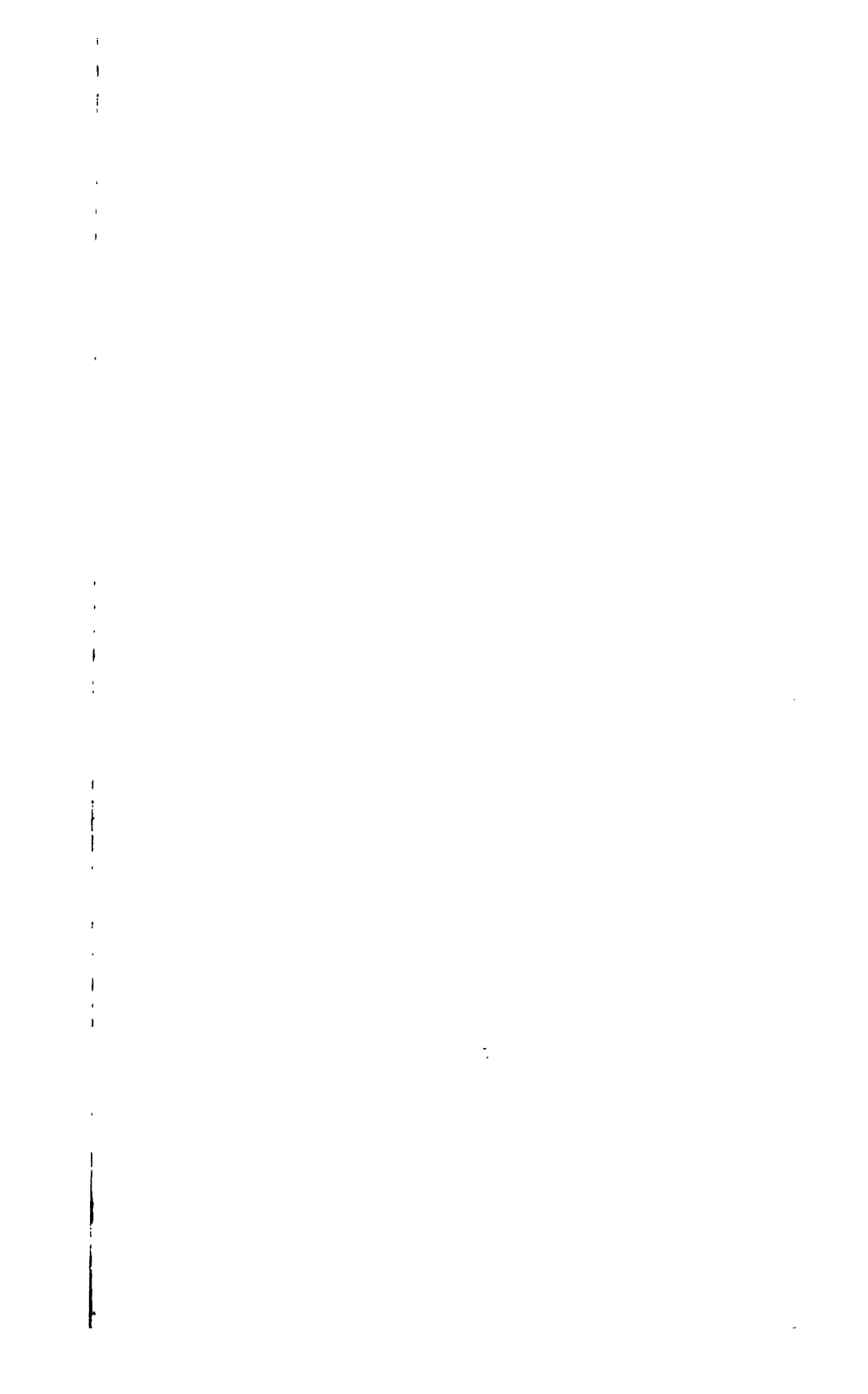
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THE ANGLO-INDIAN CODES

WHITLEY STOKES

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THE



ANGLO-INDIAN CODES

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COUNCIL OF THE GOVERNOR-GENERAL OF INDIA

VOL. I.

SUBSTANTIVE LAW

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*'Our principle is simply this—uniformity when you can
have it; diversity when you must have it; but in
all cases certainty.'—MACAULAY.*



DEDICATED TO

SIR HENRY SUMNER MAINE, K.C.S.I.

MEMBER OF THE COUNCIL OF INDIA

IN GRATITUDE FOR

WISE TEACHING, FRIENDLY ENCOURAGEMENT

AND OFFICIAL SUPPORT

TABLE OF CONTENTS.

GENERAL INTRODUCTION	PAGES ix
TABLE OF ABBREVIATIONS	xxix
TEXT-BOOKS AND COMMENTARIES CITED OR REFERRED TO	xxxii
INTRODUCTION TO THE PENAL CODE	1-72
CONTENTS OF THE PENAL CODE	73
ARRANGEMENT OF SECTIONS	74-90
THE INDIAN PENAL CODE	91-293
INTRODUCTION TO THE SUCCESSION ACT	295-322
ARRANGEMENT OF SECTIONS	323-336
THE INDIAN SUCCESSION ACT, 1865	337-484
INTRODUCTION TO THE GENERAL CLAUSES ACT	485, 486
THE GENERAL CLAUSES ACT, 1868	487-490
INTRODUCTION TO THE CONTRACT ACT	491-534
CONTENTS OF THE CONTRACT ACT	535-544
THE INDIAN CONTRACT ACT, 1872	545-657
INTRODUCTION TO THE NEGOTIABLE INSTRUMENTS ACT	659-665
CONTENTS OF THE NEGOTIABLE INSTRUMENTS ACT	666-672
THE NEGOTIABLE INSTRUMENTS ACT, 1881	673-725
INTRODUCTION TO THE TRANSFER OF PROPERTY ACT	726-739
CONTENTS OF THE TRANSFER OF PROPERTY ACT	740-744
THE TRANSFER OF PROPERTY ACT, 1882	745-820
INTRODUCTION TO THE TRUSTS ACT	821-832
CONTENTS OF THE TRUSTS ACT	833-836
THE INDIAN TRUSTS ACT, 1882	837-878
INTRODUCTION TO THE EASEMENTS ACT	879-888
CONTENTS OF THE EASEMENTS ACT	889-891
THE INDIAN EASEMENTS ACT, 1882	892-927
INTRODUCTION TO THE SPECIFIC RELIEF ACT	928-940
CONTENTS OF THE SPECIFIC RELIEF ACT	941-944
THE SPECIFIC RELIEF ACT	945-991
INDEX	993-1030
ADDENDA	1031-1034
CORRIGENDA	1035



GENERAL INTRODUCTION.

THIS work contains the principal Codes of law which have, during the last twenty-six years, been enacted by the Governor-General of India in Council. The first volume deals with Substantive Law, and contains the Penal Code, the Succession Act, the General Clauses Act, and the Acts relating respectively to Contract, Negotiable Instruments, Transfer of Property, Trusts, Easements, and Specific Relief. The second volume deals with Adjective Law, and contains the Code of Criminal Procedure, the Code of Civil Procedure, the Evidence Act, the Limitation Act, and (in an appendix) the Acts relating respectively to Court-fees, Stamps, and Registration. Repeals and amendments effected by subsequent legislation are shown in their proper places. Each Code is preceded by an introduction giving a general view of its objects and contents, pointing out its principal divergencies from English law, and making suggestions for its amendment. The foot-notes to the sections embody or refer to the rulings of the Indian High Courts on their wording and the English decisions on which many of them are founded.

It is hoped that such a work will be useful in India, not only to the judges, legal practitioners, and law-students, for whom it is primarily intended, but also to bankers, traders, public servants, and future legislators; and that in England and the Colonies it will be welcome to lawyers who have to advise on Indian settlements, titles, and contracts: to merchants and others transacting business with India: to candidates for the Indian Civil Service: to all who take an interest in the efforts of English statesmen to confer on India the

blessings of a wise, clear, and ascertainable law, and especially to those who are interested in what is still, in London and New York, the burning question of Codification.

Origin of
the scheme
of Indian
codifica-
tion.

The scheme of giving to British India a complete and definite system of law probably originated in a correspondence which took place about 1829, between Sir Charles Metcalfe and the Judges of Bengal¹. It was adopted by Parliament on the renewal of the Charter in 1833. In the debates which preceded the passing of that measure, Mr. Charles Grant, the President of the India Board, called attention (June 13th²) to 'the defects in the laws of India, in the authority for making them, and in the manner of executing them.' His colleague, Mr. Macaulay, said a few days later, in a speech on the same subject, 'I believe that no country ever stood so much in need of a code of law as India, and' (he added, alluding to the supposed facility of obtaining the enactment of a code when it had obtained the approbation of the Government) 'I believe also that there never was a country in which the want might be so easily supplied.' 'Our principle,' he said, 'is simply this,—uniformity when you can have it; diversity when you must have it; but, in all cases, certainty.' The Act³ which gave effect to these views recites that it is 'expedient that such laws as may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings, and peculiar usages of the people, should be enacted,' and provides for the appointment of a Law Commission in India, with the fullest powers to inquire and report.

The first
Indian
Law Com-
mission.

This Commission, composed of Messrs. T. B. Macaulay, J. M. Macleod, G. W. Anderson and F. Millett, met in 1834, and, under the instructions of the Local Government, the Commissioners employed themselves, in the first instance, in the preparation of the draft of a penal code. So completely was it understood that the Penal Code only formed part of

¹ Evidence of Sir E. Ryan, Lords Committee, 15th March, 1853.

² Hansard, 3rd Ser., vol. 18, p. 698.

³ 3 & 4 Wm. IV. c. 85, sec. 53.

a larger design, that the Commissioners, in transmitting their draft to Lord Auckland, the Governor-General, made the following remarks:—

‘Your Lordship in Council will be prepared to find in this performance those defects which must necessarily be found in the first portion of a code. Such is the relation which exists between the different parts of the law, that no part can be brought to perfection while the other parts remain rude. The Penal Code cannot be clear and explicit while the substantive civil law and the law of procedure are dark and confused. While the rights of individuals and the powers of public functionaries are uncertain, it cannot always be certain whether those rights have been attacked, or those powers exceeded¹.’

The general revision of the civil and criminal law of India was regarded by the Court of Directors and by the Government in India as the undoubted duty of the Law Commission. The Court, in a despatch dated June 29, 1836, assuming that the attention of the Commissioners had been called to the complaint of the East Indians², that ‘it was not clear by what civil law their rights were determined unless they resided within the jurisdiction of the Supreme Court,’ expressed, for the guidance of the Commissioners, its ‘opinion as to the points which ought to be chiefly regarded in determining the general system of judicial establishments, and of laws, civil and criminal, applicable to all classes of the inhabitants of India.’ And in the following year the Government of India sent the correspondence on this and other subjects to the Law Commissioners, with directions to take them into consideration ‘in the proper place,’—in the course of the general revision of the Civil Code³.

The next Charter Act, 16 & 17 Vict., c. 95, provided for the appointment of a Commission in England, to examine and consider the recommendations of the Indian Law Com-

The second
Com-
mission.

¹ Letter of 14th October, 1837, prefixed to Draft Penal Code.

² i.e. the people of mixed blood, descended from British fathers and

Native mothers, and sometimes called Eurasians.

³ Bengal Legislative, No. 13, 20th March, 1837.

mission, &c. This second Commission, composed of Sir John Romilly M.R., Sir John Jervis, Sir Edward Ryan, and Messrs. R. Lowe (now Lord Sherbrooke), C. H. Cameron, John M. Macleod and T. F. Ellis, prepared the plan of a new system of judicature, with drafts of Codes of Criminal and of Civil Procedure. They also examined, and in effect adopted, the recommendations of the first Commission regarding the substantive civil law; and seeing that such a law could not be framed within the time allowed for making all their reports, they reported as follows¹:—

‘ . . . We have given our attentive and anxious consideration to the means of remedying the great defects in the state of the laws in India to which we have now adverted; and we have arrived at the conclusion that what India wants is a body of substantive civil law, in preparing which the law of England should be used as a basis; but which, once enacted, should itself be the law of India on the subjects it embraced. The framing of such a body of law, though a very arduous undertaking, would be less laborious than to make a digest of the law of England on those subjects, as it would not be necessary to go through the mass of reported decisions in which much of English law is contained. And such a body of law, prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions, and usages of the population, would, we are convinced, be of great benefit to that country. . . .

‘ We have the satisfaction of being able to state that our opinions as to the defects in the state of the substantive civil law in India, and the expediency of framing and enacting a body of law for India based upon English law, are very much in accordance with the views of the Law Commissioners in India.’

The Adjective law codified.

In 1859 the Indian Legislature enacted a Code of Civil Procedure (VIII of 1859) and a Limitation Act (X of 1859). In the following year the Penal Code was passed, and in 1861 a Code of Criminal Procedure (XXV of 1861). The bulk of the adjective law of India was thus for the first time codified.

¹ Second Report of Indian Law Commissioners of 1853, dated 13th December, 1855, Appendix to First Report of Commissioners of 1861, p. 58.

In December, 1861, a fresh Commission, expressly based on the report of the second Commission, was issued, for the purpose of framing for India, in the words of that Report, 'a body of Substantive law, in preparing which the law of England should be used as a basis, but which once enacted should itself be the law of India on the subject it embraced; and also for the purpose of considering and reporting on such other matters relating to the reform of the laws of India as might be referred to them by the Secretary of State.' This Commission, originally composed of Sir John Romilly M.R., Sir W. Erle C.J., Sir E. Ryan, Mr. R. Lowe, Mr. Justice Willes, and Mr. J. M. Macleod, was repeatedly renewed¹; and it submitted several reports containing drafts of proposed Rules of Law² to the successive Secretaries of State, by whom they were transmitted to the Government of India with a view to legislation. Of these drafts the first was carried through the Council in 1865 by Sir H. S. Maine, and is now the Indian Succession Act. They were received by the Secretary of State and by the Indian Legislature as instalments of a recognised public work, and not as isolated measures of legislation.

For instance, on the 13th November, 1867, the late Lord Iddesleigh, then Sir Stafford Northcote, expressed to the members of the Commission his thanks, as well as those of his Council, 'for this very valuable report (the third), constituting, as it does, another portion of that great work which is destined to confer such solid benefits on the people of India.'

¹ Sir W. M. James L.J. succeeded Sir W. Erle; Mr. John Henderson succeeded Mr. Justice Willes; and Mr. Justice Lush succeeded Mr. Henderson.

² The first report (1863) contained the draft Succession Act: the second (1866) the draft Contract Act: the third (1867) a draft Negotiable Instruments Act: the fourth (1867) was a reply to certain remarks of the

Government of India as to specific performance: the fifth (1868) contained a draft Evidence Act: the sixth (1870) a draft Transfer of Property Act: the seventh (1870) related to the revision of the Code of Criminal Procedure. When the Commission resigned it left a draft code of the law of Insurance (fire, life, marine), which is now in the Legislative Department of the Government of India.

In 1865 the Viceregal Council passed a Marriage Act, in 1866 a Companies Act, in 1868 the General Clauses Act, and in 1869 the Divorce Act; all which Codes were drawn in India by direction and under the superintendence of Sir H. S. Maine.

On the resignation of the majority of the members of the third Commission, under the circumstances mentioned *infra*, p. 534, the Duke of Argyll, on the 7th July, 1870, remarked :—

~~I have~~ long known, and from recent observation since I have held the seals of this office I have had better opportunities for appreciating, the high value to be placed on your labours and those of your predecessors in the same public trust. You and they have laid the foundations of a systematic jurisprudence for India, and I can only hope that those who may have to continue the work, whether in this country or in India itself, will follow successfully in the course which your wisdom and forethought have marked out for them. At the same time I am fully aware that the work which you undertook is by no means completed, and I could wish that you had felt it in your power to continue the operation of your Commission,' &c.

In 1871 a new Limitation Act (IX of 1871) was carried through the Viceregal Council by Mr., now Sir Fitzjames Stephen, and in the following year the Council enacted his Evidence Act (I of 1872), the Contract Act (IX of 1872), and second editions of the Code of Criminal Procedure and the Marriage Act.

Lord Salisbury advocates the continuance of codification.

In 1874 the little Code relating to European Minors (XIII of 1874) was carried by Mr., now Lord Hobhouse, and in 1877 the same learned person carried the Specific Relief Act (I of 1877).

In the beginning of 1875 Lord Salisbury wrote to the Government of India¹, calling attention to the fact that the statutory provision for the appointment of an Indian Law Commission had been designedly left in force by the Indian Councils Act and subsequent legislation. His despatch contained the following passages :—

‘2. It is difficult to exaggerate the value of the work which has been accomplished by the various persons and bodies who have

¹ Legislative, No 12, dated 4th March, 1875.

contributed to the codification of Indian Law, and specially by the successive Law Commissions. It is no small benefit to the people who resort so freely to English Courts of Judicature, that they should possess so many branches of the law of India stated in orderly sequence and simple language. But the work is not complete, although the portion already accomplished is considerable. The Criminal Law is set forth in the Penal Code. The procedure of the Criminal Courts and most of the administrative rules essential to efficient government are contained in the Code of Criminal Procedure. A Code of Civil Procedure has been in force for several years, and when it has been revised by you, it will contain the whole procedure of the Civil Courts. These three Codes are alone complete; but the whole law of Contract, of Evidence, of testamentary and intestate succession among Europeans, of European marriage and divorce, of limitation and prescription, are contained in a series of measures of no great compass or intricacy which are ready to be made chapters of a Civil Code.

‘3. It is impossible to deny that these measures have removed a serious amount of complexity and confusion. But some of the chief branches of law remain still uncoded, and litigation or questions arising under them is still subject to needless uncertainty and cost. The causes which led to the suspension by the Law Commissioners of the process of codification are much to be regretted, but they form no ground for abandoning the completion of an indispensable task.’

Lord Salisbury also intimated his intention to entrust to a small body of eminent draftsmen, selected for the purpose, the task of preparing for the Legislative Council the remaining branches of the Indian Code.

To this despatch the Government of India replied¹, stating certain objections to the plan proposed by Lord Salisbury, and on the 20th January, 1876, his lordship answered in a despatch containing the following passages :—

‘3. While I recognise the delicate and arduous nature of the work of codification, and feel that it must be almost impossible to execute it in such a manner as to be wholly free from the objections which you urge against it, I am convinced that the force of

¹ No. 6 of 1875, 5th July.

those objections may be reduced to a minimum by skill, moderation and discretion, and that, rating these drawbacks on codified law at the utmost, they are altogether outweighed by the vast practical usefulness which has recommended this method of legislation to most of the nations of Europe.

'4. But independently of these considerations, the long and continuous course of action which has been pursued by the Indian Government in all its branches forbids me to regard the question of giving a Civil Code to India as in any sense an open one.'

Lord Salisbury then related the steps taken in England to form a Code for India, and then proceeded thus :—

The completion of the Code is an accepted policy.

'9. On a review of these facts, I am of opinion that the completion of a Code of Law is an accepted policy, which cannot now be abandoned without great detriment to the people and serious discredit to the Indian Government. I forbear, therefore, from dwelling on the reasons which might be adduced in favour of that policy, if its continuance were now under discussion.

'10. I may however observe that the need of such a Code appears to me to be even greater at this moment than when its preparation was first resolved upon, because there is now an additional agency at work which is already producing embarrassing effects, and requires to be properly directed. The amalgamation of the Presidency and Mufassal Courts having taken place before the formation of the Civil Code which they were intended to administer, it has been remarked that the general direction to follow the dictates of equity, which is alone given to them for their guidance, is apt to be interpreted by many of the Judges of Appeal by the light of English authorities with which they are familiar¹, but which are necessarily unknown to the litigant parties and even to the Judges of first instance. Thus, it is said, many rules ill-suited to oriental habits and institutions, and which would never recommend themselves for adoption in the course of systematic law-making², are indirectly finding their way into

¹ That 'justice, equity, and good conscience' are, at least in the Bombay Presidency, equivalent to English law, see 2 Bom. H. C. 36, 52.

² See for instance the decisions of the High Courts against the existence of an easement to restrain interference with privacy, *infra*, pp. 881, 907: the

application to a Muhammadan mortgage of the rule in *Shuttleworth v. Laycock*, *infra*, p. 777, note 3: the rule as to strict construction of penal laws, etc. Even where the Court has ultimately decided against the application of an English technicality, public time is wasted by the argument

India by means of that informal legislation which is gradually effected by judicial decisions.

‘II. It is manifest that the only way of checking this process of borrowing English rules from the recognised English authorities is by substituting for those rules a system of codified law, adjusted to the best Native customs and to the ascertained interests of the country. Up to the present time only two chapters of the Indian Civil Code have been enacted, treating respectively of Succession and of Contract. In order that the formation of this body of law may be carried on to the best advantage, it will be important to know on what subjects legislation is most urgently required. Your Excellency’s Government enjoys peculiar opportunities of forming a judgment on this point, and I request that I may be favoured with your opinion on the question, in what order the remaining branches of law ought to be taken up, and whether each branch should, as in the case of the Contract Act, extend to the whole country, or should, like the Law of Succession, apply only in the first instance to certain special classes or provinces.’

The Government of India replied on the 10th May, 1877, by a despatch containing the following passage:—

‘We have, in the first place, to express our regret that our answer to your Lordship’s despatch of 4th March, 1875 (Legislative, No. 12), was so worded as to lead your Lordship to suppose that we attach less importance than you should have expected to the early completion of the body of Substantive Civil Law which has long been in course of formation for India. We feel, on the contrary, that the reduction to a clear, compact and scientific form, of the branches of our Substantive Law which are still uncoded, would be a work of the utmost utility, not only to the Judges and the legal profession, but also to the people and the Government. It would save labour and thus facilitate the despatch of business and cheapen the cost of litigation: it would tend to keep our untrained Judges from error: it would settle disputed questions on which our superior Courts are unable to agree: it would (as your Lordship has observed in the despatch under reply) preclude the introduction of technicalities and doctrines unsuited to this country: it would, perhaps, enable us to make some urgently needed social

and the necessity of preparing an elaborate judgment. See for example 6 Bom. 151, where it was held that

the rule in Shelley’s Case did not apply to Pársis in the Bombay mufassal.

✓ reforms without the risk of exciting popular opposition ; and it would assuredly diffuse among the people of India a more accurate knowledge of their rights and duties than they will ever attain if their law is left in its present state, that is to say, partially codified, but the bulk ascertainable only from English text-books written solely with reference to the system of English law, and from a crowd of decisions, often obscure and sometimes contradictory, to be found in the English and Indian law reports.

The Government of India might have added that the difficulty here referred to is increased by the fact that the four High Courts of India are independent of each other, and do not show that regard for each other's decisions which is the habit of Courts of concurrent grade in England ¹.

The despatch then proposed that, amongst others, the following branches of substantive law should be codified—Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments, and Transfer of Immoveable Property; and indicated the order in which they should be dealt with. With the doubtful exception of the law of Master and Servant, and subject to certain rights and usages, the Government of India thought that these measures might be safely applied to every one in British India. In conclusion, the Governor-General in Council expressed an opinion that the codification of Indian law should be carried out in India rather than in England.

To this the Secretary of State replied on the 9th August, 1877, sanctioning the course suggested by the Governor-General in Council.

I thereupon proceeded to draw Bills dealing respectively with Private Trusts, Easements, Alluvion, and Master and Servant. Mr. Arthur Phillips, now of the Calcutta Bar, but then Secretary in the Legislative Department, redrew the Bill codifying the law of negotiable paper; and the Transfer of Property Bill, which, like the Negotiable In-

¹ See Collett, *Specific Relief Act*, vi, vii.

struments Bill, was originally drawn in England by the third Law Commission, was remodelled to such an extent that only five of the original sections remain in substance. This work took nearly two years.

These Bills were, on the 11th February, 1879, referred for consideration to a new Commission composed of Sir Charles Turner, then Chief Justice of Madras, Mr. Raymond West, one of the Judges of the High Court at Bombay, and myself. The Commission reported on the 15th November, 1879, making the following specific recommendations:—

(a) that the process of codifying well-marked divisions of our substantive law should continue;

(b) that the eventual combination of those divisions as parts of a single and general Code should be borne in mind;

(c) that the English law should be made the basis in a great measure of our future Codes, but that its materials should be recast rather than adopted without modification;

(d) that in recasting those materials, due regard should be had to Native habits and modes of thought; that the form which those materials should assume should, as far as possible, resemble that of rules already accepted; that, in other words, the propositions of our Codes should be broad, simple, and readily intelligible;

(e) that uniformity in legislation should be aimed at, but that special and local customs should be treated considerately;

(f) that the existing law of persons should not at present be expanded by way of codification, save that the operation of the European British Minors Act, XIII of 1874, should be extended;

(g) that the laws relating respectively to negotiable instruments, to the subjects dealt with by the Transfer of Property Bill, to trusts, to alluvion, to easements, and master and servant, should be codified, and the Bills already prepared on these subjects be passed into law, subject to the amendments suggested in the report;

(A) that the law of actionable wrongs should then be codified ;

(i) that, concurrently with or after the framing of a law of actionable wrongs, the laws relating to insurance, carriers, and lien should be codified ;

(j) that the legislature should then deal with the law of Property in its whole extent ;

(k) that preparation be made for a systematic chapter on interpretation.

In accordance with these recommendations, the Council of the Governor-General enacted in 1881 the Code relating to Negotiable Instruments, and in 1882 the Codes relating respectively to Trusts, Transfer of Property, and Easements. Revised editions of the Codes relating to Companies, Civil Procedure, and Criminal Procedure were also passed in that year.

From the foregoing outline of the history of Indian codification, it will appear to be the settled policy of Parliament and of the Indian Government that a complete substantive civil law is to be given to India ; and, even without the warning conveyed by the letter of Lord Macaulay and his colleagues, in their letter above cited, that 'no part of the law can be brought to perfection while the other parts remain crude,' it is plain that the suspension of the undertaking can only be justified by necessity.

Cessation
of codifica-
tion.

Such necessity has certainly not arisen. However, from causes that must not be here stated, although the law-membership of the Governor-General's Council has lately been held by an exceptionally able draftsman, nothing has for the last four years been done to codify the law of India, except the preparation (in England) of a bill dealing with actionable wrongs, and (in India) of a bill to extend the operation of the European Minors Act. To all appearance, the Indian Government has at last yielded to influences resembling those which in India pigeon-holed the Penal Code for more than twenty years, and which here in England

deprive the nation of the priceless boon of a body of substantive law not only wise, but clear, compact, and easily ascertainable.

It cannot with truth be said that the feeling of the people of India is, or ever was, one of these influences. More than fifty years ago the East Indians and Indian Armenians complained of the want of a system of law¹. The Native Christians, by their missionaries, made similar complaints², so far at least as regarded inheritance, marriage, and the powers of parents and guardians. The Pársís have themselves codified their peculiar laws of intestate inheritance, marriage, and divorce³, and gladly accepted the statutory rules as to testamentary succession. As to the bulk of the population, the Hindús and Muhammadans, the words used by the venerable Sayyid Ahmad, when the Transfer of Property Act was passed, are better evidence than any that I or any other European could offer. Said the Sayyid:—

‘So far as I am aware, the Native public has never raised its voice against codification. To them, codified laws mean the introduction of certainty where there is uncertainty, precision where there is vagueness. Nor can it be said that codification is unpopular even among the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not, even at this time of life, in a position to say confidently, that of all the innumerable blessings of the British rule, the one my countrymen esteem most is justice; that justice in their eyes means peace and order, which, in other words, mean security to life and property—the sole aim and end of government. At present, whilst a splendid Penal Code and a Criminal Procedure [Code] regulate criminal matters, the Civil law is administered on the somewhat vague, though noble, principle of ‘justice, equity, and good conscience’;—a principle much of whose beauty is practically spoilt by the fact that individual judges in similar cases do not take the

¹ See Appendix B to the first report of H.M.’s Commissioners appointed to prepare a body of substantive law for India, p. 59.

² Ibid. 65.

³ These codes are now Acts XV

and XXI of 1865.

⁴ See Bom. Reg. IV of 1827, sec. 20: Act VI of 1871, sec. 74: Act III of 1873, sec. 17: XX of 1875, sec. 6: XVIII of 1876, sec. 3.

same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, [and] from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification, and codification alone, can remedy the evils which arise from uncertainty of the law : codification alone can enable the public to know their exact rights and obligations : codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India : codification alone will enable the deliberate will of the legislature to prevail over the opinions of individual judges ; and litigants will then be more anxious, before going into Court, to consult the Statute-book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision¹.

It is now necessary to make some remarks as to the form and substance of the Codes, and the sources of the introductions and notes contained in this work.

Rules followed by draftsmen of Indian Codes.

The draftsmen of these Codes have (consciously or unconsciously) all worked on the same plan. As to the formal divisions, they have acted on the rules that every Act should be divided into sections and, where necessary, Chapters and Parts² : that lengthy sections should be subdivided into clauses and paragraphs : that each Act should be preceded by a table of contents made up of the marginal notes³ to the sections : that it should be furnished with a Short Title, indicating, in a general way, the subject of the law, a preamble expressing only the purpose of the enactment⁴, a statement of its local and, where necessary, its personal, application, and the time at which it is to come into force : that the definitions⁵ should stand at the beginning of the Act, and that

¹ Abstract of Proceedings of the Council of the Governor-General, 26 Jan., 1882, p. 63.

² As to referring to the headings of Chapters and Parts as guides to the meaning of sections, see 5 Bom. H. C., C. C. 71, 72, per Couch C.J. : 6 Bom. H. C., A. C. J. 260 : 15 Ben. 234.

³ In the present edition, many of

these notes have been shortened and some corrected. That they are of no effect, see L. R., 3 C. P. 511, 522, per Willes J. ; and 11 Ch. D. 449.

⁴ As to the effect of the title, see Wilberforce, *Statute Law*, 274 ; as to preambles, see 2 Mad. H. C. 322 : 3 Mad. H. C. 8, per Holloway J.

⁵ As to the effect of an interpreta-

a word should never be defined to mean something that it does not properly include. As to the arrangement, their chief rules have been: that all matter of the same kind should be thrown together: that the simpler proposition should precede the more complex¹: that procedure should be dealt with according to the chronological order in which ordinary events occur: that special proceedings and supplementary provisions should be separately treated; and that forms and other matters of detail should be placed in schedules. As to the wording: that each sentence should have only one enacting verb: that the same word should be used to express the same thing: that nouns should be used in preference to pronouns²: that technical expressions should not be used unnecessarily: that 'shall' should be used only when the law is directory, that 'may' should be used only when the law is permissive. Except as regards the place of the definitions, these rules, which unfortunately have not always been followed, agree with the practice of the best parliamentary draftsmen³.

But there is one salient peculiarity of the Anglo-Indian Codes—the use of illustrations—which, although it has been noticed, *infra*, pp. 12 and 297, must here be more fully considered. Traces of the idea of adding specific illustrations to general propositions may be found in Bentham⁴; and Austin is said to have used them in a draft code of the law of libel which he prepared for Malta. But how

tion clause, see *Meux v. Jacobs*, L. R., 7 H. L. 493: *Lindsay v. Cunday*, 1 Q. B. D. 348.

¹ See for example the Penal Code, chap. xvi and xvii.

² Macaulay occasionally carried this rule to an excess. See for example the Penal Code, sec. 499, expl. 4.

³ See Mr. Arthur Symonds' remarks in a bluebook entitled *Papers relative to the drawing of Acts of Parliament*, London, 1838, and Sir Henry, now Lord Thring's *Practical Legislation*, London, 1878.

⁴ See his *Specimen of a Penal Code*, Works, i. 164. Mr. Pollock, *Ptp.*, Introduction, iv, calls the invention 'the greatest specific advance that has been made in modern times in the art called by an ingenious writer "the mechanics of law-making." . . . It is an instrument of new constructive power, enabling the legislator to combine the good points of statute-law and case-law, such as they have hitherto been, while avoiding almost all their respective drawbacks.'

ever this may be, the first to use them in practical legislation was Macaulay; and their nature and object cannot be better stated than in his own words, taken from the letter to Lord Auckland prefixed to the draft Indian Penal Code:—

The use of
illustra-
tions.

‘One peculiarity in the manner in which this Code is framed will immediately strike your Lordship in Council. We mean the copious use of illustrations. These illustrations will, we trust, greatly facilitate the understanding of the law, and will at the same time often serve as a defence of the law. In our definitions we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning, and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a few students after long application. Yet such definitions are found, and must be found, in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them he will give a smoother and more attractive appearance to his workmanship: but in that case he flinches from a duty which he ought to perform, and which somebody must perform. If this necessary but most disagreeable work be not performed by the law-giver once for all, it must be constantly performed in a rude and imperfect manner by every judge in the empire, and will probably be performed by no two judges in the same way. We have, therefore, thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a Code. And we hope that when each of these definitions is followed by a collection of cases falling under it, and of cases which, though at first sight they appear to fall under it, do not really fall under it, the definition and the reasons which led to the adoption of it will be readily understood. The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded, and may sometimes show him that a phrase which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases. In the study of geometry it is constantly found that a theorem which, read by itself, conveyed no distinct meaning

to the mind, becomes perfectly clear as soon as the reader casts his eye over the statement of the individual case taken for the purpose of demonstration. Our illustrations, we trust, will in a similar manner facilitate the study of the law.

‘There are two things which a legislator should always have in view while he is framing laws : the one is, that they should be as far as possible precise ; the other, that they should be easily understood. To unite precision and simplicity in definitions intended to include large classes of things, and to exclude others very similar to many of those which are included, will often be utterly impossible. Under such circumstances it is not easy to say what is the best course. That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the Courts of Justice.

‘On the whole, we are inclined to think that the best course is that which we have adopted. We have, in framing our definitions, thought principally of making them precise, and have not shrunk from rugged or intricate phraseology when such phraseology appeared to us to be necessary to precision. If it appeared to us that our language was likely to perplex an ordinary reader, we added as many illustrations as we thought necessary for the purpose of explaining it. The definitions and enacting clauses contain the whole law. The illustrations make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effects will be on the events of common life.

They make nothing law which would not be law without them.

‘Thus the code will be at once a statute book and a collection of decided cases. The decided cases in the code will differ from the decided cases in the English lawbooks in two most important points. In the first place, our illustrations are never intended to supply any omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the judges but by the legislature, by those who make the law, and who must know more certainly than any judge can know what the law is which they mean to make.

How they differ from case-law.

‘The power of construing the law in cases in which there is any

real reason to doubt what the law is amounts to the power of making the law. On this ground the Roman jurists maintained that the office of interpreting the law in doubtful matters necessarily belonged to the legislature. The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a code. 'Eorum vanam subtilitatem tam risimus quam corrigendam esse censuimus. Si enim in praesenti leges condere soli imperatori concessum est, et leges interpretari solo dignum imperio esse oportet, quis legum aenigmata solvere et omnibus aperire idoneus esse videbitur nisi is cui legislatorem esse concessum est? Explosis itaque his ridiculis ambiguitatibus tam conditor quam interpres legum solus imperator juste existimabitur¹.'

Illustrations compared with the imperial rescripts.

'The decisions on particular cases which we have annexed to the provisions of the code resemble the imperial rescripts in this, that they proceed from the same authority from which the provisions themselves proceed. They differ from the imperial rescripts in this most important circumstance, that they are not made *ex post facto*, that they cannot therefore be made to serve any particular turn, that the persons condemned or absolved by them are purely imaginary persons, and that therefore, whatever may be thought of the wisdom of any judgment which we have passed, there can be doubt of its impartiality.'

Substance of the Indian Codes.

So much as to the form of the Codes. As to their substance, it will be enough to say that their basis is the law of England, stript of its local peculiarities, and modified with regard to the condition, institutions and climate of India, and the character, religions and usages of the population. Instances of these modifications will be found in the rules as to frivolous complaints; the right of self-defence; bribery; destroying or defiling places of worship and sacred objects; marriage; torture; kidnapping; rape; criminal intimidation; breach of contract for service; in the exception from sec. 292 of the Penal Code of obscene representations on temples and cars; in the rules as to mortgages, air, privacy, rights of way, specific performance; in the savings of local usage²,

¹ Cod. Just., lib. I. tit. xiv. 12.

Succession Act, secs. 331, 332: the

² See the Penal Code, sec. 5: the

Contract Act, sec. 1: the Negotiable

and of local, special, and personal laws; and, lastly, in the exemptions of the backward parts of India called the Scheduled Districts¹ from the operation of rules too elaborate for their inhabitants or administrators.

In writing the introductions and notes, I have freely used the Statements of Objects and Reasons by which, according to the practice of the Indian legislatures, all Bills are accompanied, and the reports of Select Committees by which they are followed. The speeches made in the Viceregal Council have also furnished some valuable matter. The introduction to the Penal Code is to a large extent founded on Macaulay's notes to the draft. The introduction and notes to the Succession Act are for the most part taken from my own edition of that Code. In the introductions and notes to the Codes of which I was the draftsman, I have embodied the memoranda made before and while drawing the Bills. Some useful hints have also been got from the commentaries published in India by Messrs. Chalmers, Collett, Field, Henderson, J. M. Macpherson, Macrae, Mayne, Morgan and A. G. Macpherson, Rattigan, and Shaw, and from a letter received in the beginning of 1886 from Mr. R. J. Crosthwaite, now Judicial Commissioner of the Central Provinces. But my principal source of help has been the decisions of the High Court judges² published in the Indian Reports from 1862 to 1886 inclusive—decisions which not only throw light on the ideas and customs of the people of India³, but are, as a rule

Sources of the introductions and notes.

Instruments Act, sec. 1: the Transfer of Property Act, secs. 2, 98, 106, 108, 117, 129: the Trusts Act, sec. 1: the Easements Act, secs. 2, 18, 20.

¹ They are enumerated in Act XIV of 1874, sched. I.

² But few cases relating to the Indian Codes have hitherto come before the Judicial Committee of the Privy Council.

³ See, for instance, in the case of the Penal Code, *infra*, pp. 117, n. 2: 123, n. 5: 127, notes 1, 3: 145, n. 6: 149, n. 1: 170, n. 2: 194, n. 5: 205, n.

1: 207, n. 2: 208, notes 1, 3: 209, n. 5: 210, n. 3: 218, n. 9: 219, n. 3: 230, n. 7: 232, n. 5: 238, n. 2: 249, n. 5: 250, n. 7: 253, n. 4: 269, n. 1: 281, notes 2, 3, and 4: 283, n. 8: 288, n. 2: in the case of the Contract Act, *infra*, pp. 546, n. 1: 559, notes 3, 4: 594, n. 4: 648, n. 3: in the case of the Negotiable Instruments Act, p. 673, n. 3: in the case of the Transfer of Property Act, pp. 770, n. 5: 801, n. 4: in the case of the Specific Relief Act, 978, note 3.

(if I may say so without impertinence), admirable for their logicity and learning. Of these judgments none can be read with more pleasure, and few with more profit, than those of the Hindú Muttusámi Ayyár and the Muhammadan Sayyid Mahmud. For the subtle races that produce such lawyers¹, no legal doctrine can be too refined, no legal machinery can be too elaborate.

Criticisms
on the
Codes.

A word in conclusion as to the criticisms which I have ventured to make on the Codes for which Macaulay, Sir Barnes Peacock, Mr. William Macpherson (the draftsman of the Succession Act and the Contract Act), Sir Henry Maine, Sir Fitzjames Stephen, and Lord Hobhouse are answerable either personally or officially. Mr. Pollock (and no one, surely, is better entitled to express an opinion on the subject) says² that the Indian Codes 'are the best models yet produced; at the same time they are by no means faultless. It is easy to see various points in which they are capable of improvement, though it must be remembered that for the purposes of Indian administration labour and ingenuity would not improbably be thrown away in working them up to the refined exactness which is an English lawyer's ideal.' Feeling as I do the justice of this courteous censure, my criticisms have been made with a view to the amendment by the legislature of the Codes to which they relate, and not with any pleasure in picking holes in the work of men who, in the opinion of all competent judges, rank with the greatest among the many benefactors that England has given to India.

W. S.

15 GRENVILLE PLACE, LONDON, S.W.

5th February, 1887.

¹ I take this opportunity to acknowledge the help obtained, in drawing chapter iv. of the Transfer of Property Act, from the work of another acute and learned Native lawyer,

Rashbehary Ghose, *The Law of Mortgage in India*, Calcutta, 1877.

² *A Digest of the Law of Partnership*, 3rd ed., Introduction, xi.

TABLE OF ABBREVIATIONS.

- Agra** = Reports of the High Court of Judicature for the North-Western Provinces, by Munshi Hanuman Pershad and Lalá Lalita Pershad, vols. i-iv, Agra, 1867, 1868.
- Agra F. B.** ... = Reports etc. containing Full Bench Rulings, Agra, 1867.
- All.** = Indian Law Reports, Allahabad Series, vols. i-viii, Allahabad, 1876-1886.
- Ben.** = Bengal Law Reports, vols. i-xv (1863-1875).
- Ben. F. B.** = Full Bench Rulings of the High Court at Fort William, Calcutta, 1874.
- Bom.** = Indian Law Reports, Bombay Series, vols. i-x, Bombay, 1876-1886.
- Bom. H. C.** ... = Reports of Cases decided in the High Court of Bombay, vols. i-xii, Bombay, 1867-1875.
- Borr.** = Borrodalle's Reports of Civil Causes adjudged by the Court of Sudur Udaltut for the Presidency of Bombay, vols. i, ii, Bombay, 1825.
- Boul.** = Reports of Cases in the Supreme Court at Fort William (1856-1859), by C. Boulnois.
- Bourke** = Reports of Cases ... in the High Court of Judicature at Fort William, by Walter M. Bourke, Calcutta, 1867.
- Cal.** = Indian Law Reports, Calcutta Series, vols. i-xii, Calcutta, 1876-1886.
- Fulton** = Reports of Cases in the Supreme Court of Judicature at Fort William, Calcutta, by J. W. Fulton, 1845.
- Hyde.** = Reports of Cases, etc., by E. Hyde. Two vols., Calcutta, 1864.
- Ind. Jur., N. S.** = The Indian Jurist, New Series (Jan. 1866—Sept. 1867).
- Mad.** = Indian Law Reports, Madras Series, vols. i-ix, Madras, 1876-1886.
- Mad. H. C.** ... = Reports of Cases decided in the High Court of Madras, vols. i-viii, 1864-1876.
- Marshall** = Reports of Cases on Appeal, Calcutta, by W. Marshall, 1864.
- Morl. Dig.** ... = An Analytical Digest of all the reported Cases decided in the Supreme Courts of Judicature in India, etc., by W. H. Morley, London, 1850, vols. i-iii.
- Morton** = Decisions of the Supreme Court of Judicature at Fort William, by T. C. Morton, Calcutta, 1841.
- N. W. P.** = Reports of Cases heard and determined in the High Court, N.W. Provinces, vols. i-vii, Allahabad, 1873-1875.
- Perry** = Cases illustrative of Oriental Life and the application of English Law to India, by Sir Erskine Perry, London, 1853.
- S. D. A.** = Reports of Cases determined in the Courts of Sudder Dewanny Adawlut, vols. i-xxiv, Calcutta, 1846-1871.
- Sevestre** = Reports of Cases on Appeal, by A. Sevestre, vol. ii, Calcutta, 1866.
- Suth.** = The Weekly Reporter, Appellate High Court, vols. i-xxvi, by D. Sutherland, Calcutta, 1864-1876.
- Suth. 1864.** ... = Sutherland's Reports of Decisions of the Appellate High Court from January to July, 1864, Calcutta, 1867.
- Suth. Sp. N.** ... = Special Number of the Weekly Reporter ... containing Full Bench Rulings from July 1862 to July 1864, Calcutta.
- Tayl. & Bell.** ... = Reports of Cases heard and determined in the Supreme Court of Judicature at Fort William in Bengal, vols. i and ii, Calcutta, 1851-1853.
- With the exception of Maddock's reports of cases temp. Plumer V.C. and Leach V.C., the English Reports have been cited in the usual manner.

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ADDENDUM.

P. 592, note 2, l. 6, *insert*—But see 10 Cal. 305, and 14 Cal. 248, where the Court thought the cases in 9 Cal. 615, 689 were overruled.

CORRIGENDA.

- P. 1, l. 3, *for three read four.*
P. 1, l. 4, *for and VIII of 1882 read VIII of 1882 and X of 1886.*
P. 7, col. 2, l. 19, *for VIII of 1881, read XII of 1886.*
P. 36, l. 17, *for It seems to me, says read Ancient English lawgivers can hardly have anticipated the opinion of*
P. 53, note 2, l. 2, *for gesellschaft read Gesellschaft.*
P. 91, l. 8, *for and VIII of 1882 read VIII of 1882 and X of 1886.*
P. 258, note 5, *for '431' read '426.'*
P. 270, ill. (d), l. 6, *for commits read commits.*
P. 274, marginal note to sec. 474, *for 'valuable security or will read document.*
P. 313, l. 16, *omit 'lately.'*
P. 485, l. 3, *for and read &.*
P. 486, l. 35, *for 'X of 1866' read 'III of 1886'*
P. 496, l. 32, *for 'signature) by' read 'signature by*
P. 509, § 7 a, *for Wages read Wagers.*
P. 513, l. 29, *for 'desired' read 'decreed.'*
P. 516, l. 28, *for him in read him, is.*
P. 527, note 6, l. 1, *for 145 read 124.*
P. 529, l. 4, *for pawnor read pawnee: l. 8, for or read on.*
P. 546, note 2, *delete the last four lines.*
P. 552, notes, col. 1, l. 8, *transfer 'Companies' to line 10, after '75.'*
P. 552, notes, col. 2, l. 12, *for expl. read excep.*
P. 560, notes, col. 1, lines 1-3. *'That . . . 480' should be transferred to the beginning of note 3, p. 561.*
P. 560, notes, col. 1, lines 10-14, *'As . . . 83' should be transferred to p. 559 and inserted in note 4, line 11, after '33.'*
P. 588, note 1, l. 1, *for nit read suit.*
P. 881, l. 32, *should be 'Illustration (b) to section 18 shews that the negative easement to restrain'*
P. 881, ll. 33-34, *delete 'and is a negative easement'*
P. 883, ll. 24-26, *delete 'Section . . . towns' and delete note 2.*
P. 955, notes, col. 2, l. 3, *for Balmarino read Balmanno.*

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INTRODUCTION TO THE PENAL CODE.

THE Indian Penal Code is now contained in the principal Act, XLV of 1860, the Whipping Act, VI of 1864, and the three amending Acts, XXVII of 1870, XIX of 1872, and VIII of 1882¹. Its enactments naturally fall into six divisions or parts, which may be thus entitled: I. Preliminary, II. Punishments, III. Offences against the State and the Public, IV. Offences against Individuals, V. Participation, and VI. Attempt². But, as the Code is at present arranged, the rules as to Punishments are placed between the chapters respectively entitled 'General Explanations' and 'General Exceptions,' which are certainly preliminary matter: bigamy and other acts injurious to public morality are treated after violence to the person: the enactments as to Participation must be sought for in chapters II (secs. 34, 35, 37, 38), V, VI (secs. 121, 125), VII (secs. 131-139), IX (sec. 164), XII (sec. 236), XVI (secs. 305, 306, 310) and XVII (secs. 391, 394, 396, 400-402, 411-414); and the enactments as to Attempt are scattered through chapters VI (secs. 121, 124, 125, 130), IX (secs. 161, 162, 163), XI (secs. 196, 198, 200, 213), XII (secs. 239, 240, 241), XVI (secs. 307, 308, 309, 318), XVII (secs. 385, 387, 389, 391, 393, 394, 398), and, lastly, XXIII. In this Introduction the Code will be considered in the order of subjects above indicated.

PART I. PRELIMINARY.

To this division belong the chapters now respectively numbered and headed I. Introduction; II. General Explanations; IV. General Exceptions.

¹ The amendments made by these Acts, as well as by Act VI of 1861 (*to alter the time from which the Indian Penal Code shall take effect*), and the Indian Oaths Act, 1873, s. 15, will be found *infra* in their proper places. The portions of the Code which have been repealed by Acts XIV of 1870, XXVII of 1870, XIX of 1872 and X of 1882, will here be omitted.

² The *Strafgesetzbuch für das Deutsche Reich* places the chapter on Attempt (*Versuch*) before that

on Participation (*Theilnahme*), and puts both before the chapters dealing with the offences implied in every attempt and participation. Surely the most simple and logical plan is first to treat offences actually committed by principals, then to deal with accessorial offences, and then with cases in which the criminal has only tried to commit one or more of the offences before considered. This plan is also the more convenient as it saves many forward references.

Chap. I. Chapter I contains the Preamble to the Code: its Short Title: the date at which it took effect (commonly called the Commencement): provisions relating to its personal application and local extent; and a section saving certain other laws.

Preamble. The brief preamble merely recites that it is expedient to provide a general penal code for British India. The expediency appears from the facts, (a) that, when the Code came into force, the criminal law of British India was, in the three Presidency towns, the English criminal law, unreformed save by 9 Geo. IV. c. 74 and Acts XXXI of 1838, XXII of 1839, and XVI of 1852¹, and, in the Mufassal², partly that introduced by the Muhammadan conquerors, partly that established by the Anglo-Indian Regulations; and (b) that the English criminal law was an artificial and complicated system, framed without reference to India, and even in England considered to require extensive reform: that the Muhammadan criminal law was unsuited to a civilised country; and that the Anglo-Indian Regulations, made by three different legislatures, contained widely different provisions, many of which were amazingly unwise³.

¹ Some small amendments were also effected by Acts VII and XIX of 1837, XXXI of 1839, VII and X of 1844.

² Except the Panjáb, where a manual of criminal law framed originally by Sir R. Temple had been given by the executive as a guide to the magistrates.

³ The following instances are taken from the letter dated the 14th Oct. 1837, addressed to Lord Auckland by Macaulay and the other members of the Indian Law Commission:—

‘In Bengal serious forgeries are punishable with imprisonment for a term double of the term fixed for perjury; in the Bombay Presidency, on the contrary, perjury is punishable with imprisonment for a term double of the term fixed for the most aggravated forgeries; in the Madras Presidency, the two offences are exactly on the same footing.

‘In the Bombay Presidency the escape of a convict is punished with imprisonment for a term double of the term assigned to that offence in the two other Presidencies, while a coiner is punished with little more than half

the imprisonment assigned to his offence in the other two Presidencies.

‘In Bengal the purchasing of regimental necessities from soldiers is not punishable, except at Calcutta, and is there punishable with a fine of only fifty rupees. In the Madras Presidency it is punishable with a fine of forty rupees. In the Bombay Presidency it is punishable with imprisonment for four years.

‘In Bengal the vending of stamps without a licence is punishable with a moderate fine; and the purchasing of stamps from a person not licensed to sell them is not punished at all. In the Madras Presidency the vendor is punished with a short imprisonment; but there also the purchaser is not punished at all. In the Bombay Presidency, both the vendor and the purchaser are liable to imprisonment for five years, and to flogging...

‘The penal law of the Bombay Presidency has, over the penal law of the other Presidencies, no superiority, except that of being digested. In framing it, the principles according to which crimes ought to be

Chapter I then declares the title of the Code, the day on which it was to come into force, and its local extent. The day (originally Commence-
 1st May, 1861) was changed by Act VI of 1861 to 1st January, 1862. The Code is in force throughout what is called 'British India,' and though it did not at first apply to the Straits Settlement, it was extended to that Settlement by Act V of 1867. The Code is also in force, by virtue of executive orders (express or implied), in the Pargana of Mánpur, the cantonment of Morár, Mysore, Ákalkot, Játh, the Haidarábád Assigned Districts, and several British cantonments in Native States¹. Local extent.

classified, and punishments apportioned, have been less regarded than in the legislation of Bengal and Madras. The secret destroying of any property, though it may not be worth a single rupee, is punishable with imprisonment for five years. Unlawful confinement, though it may last only for a quarter of an hour, is punishable with imprisonment for five years. Every conspiracy to injure or impoverish any person is punishable with imprisonment for ten years; so that a man who engages in a design as atrocious as the Gunpowder Plot, and one who is party to a scheme for putting off an unsound horse on a purchaser, are classed together, and are liable to exactly the same punishment. Under this law, if two men concert a petty theft, and afterwards repent of their purpose and abandon it, each of them is liable to twenty times the punishment of the actual theft. All assaults which cause a severe shock to the mental feelings of the sufferer are classed with the atrocious crime of rape, and are liable to the punishment of rape, that is, if the Courts shall think fit, to imprisonment for fourteen years. The breaking of the window of a house, the dashing to pieces a china cup within a house, the riding over a field of grain in hunting, are classed with the crime of arson, and are punishable, incredible as it may appear, with death. . .

'By the Bombay Code the con-

cealment after the fact of murder is punishable as murder:—the concealment after the fact of gang-robbery is punishable as gang-robbery:—and this, though the concealment after the fact of the most cruel mutilations, and of the most atrocious robberies committed by not more than four persons, is not punished at all. . . . We have said enough to show that it is owing, not at all to the law, but solely to the discretion and humanity of the judges, that great cruelty and injustice is not daily perpetrated in the Criminal Courts of the Bombay Presidency.' As Dr. Markby truly says, 'The only successful legislation has been the work of lawyers;' Elements, § 194.

¹ Ábú and Anádra, Ágar, Bangalore, Baroda, Deoli, Dísah, Ellichpur, French Rocks, Gunáh, Indore Residency, Naogaon, Nímach, Rájkot, Sikandarábád, and probably others. It is in force as regards subjects of Her Majesty in the Salt Sources of the Rájputána Agency. It has also been extended to the head-works of the Bhawalwah-Lodran Canal (Bhawalpur), and to the lands in Native States occupied by the following railways: Bhaunagar-Gondal; Bombay, Baroda and Central India; Great Indian Peninsula; Káthiawár; Madras; Nágpur and Chhatísgarh; Nizam's; Western Rájputána-Málwa; and Western Rájputána. Outside India it is in force, so far as regards subjects of Her Majesty, in Zanzibar by virtue of the

Personal
applica-
tion.

Sec. 2 declares that 'every person' shall be liable to punishment under the Code, 'and not otherwise,' for violating its provisions in British India on or after the 1st January, 1862. Here the words 'every person' include members of ancient sovereign houses residing in British India¹, and subjects of foreign states entering that country; and there is no exception in favour of ambassadors² or other public ministers of foreign princes. But notwithstanding sec. 11, they mean in most places natural persons, and do not include juridical persons, such as a corporation. A crime if committed by such a body is, as a rule, only punishable as committed by such members of it as took part in the act. The words 'and not otherwise' virtually repeal all former laws for the punishment of any offence made punishable by the Code³. And the words 'on or after the 1st of January, 1862,' leave offences committed before that day to be punished under the old regulations⁴.

Extra-
territorial
operation.

Sections 3 and 4 relate to the extra-territorial operation of the Code. The former section declares that any person liable 'by any law passed by the Governor-General of India in Council' to be tried for an offence committed beyond the limits of British India shall be dealt according to the provisions of the Code for any act⁵ committed beyond those limits in the same manner as if it had been committed within them; and section 4 makes the Code apply to offences committed by servants of the Queen (sec. 14) within the

Zanzibar Order in Council of 1884; and the legislature of Ceylon has recently enacted a Penal Code in which much has been borrowed from the Indian Act; *Law Quarterly Review*, Jan. 1886, p. 44.

¹ As, for instance, the Nawáb of Surat (Act XVIII of 1848), the Nawáb Nazim of Bengal (Act XXVII of 1854), the Nawáb of the Carnatic (XXXVII of 1858), the King of Oudh. This last-named personage is, however, exempt from the jurisdiction of criminal courts except for capital offences (Act VIII of 1862). The Governor-General and members of his Council are exempt from the criminal jurisdiction of Indian High Courts, 13 Geo. III, c. 63, secs. 15, 17: 21 Geo. III, c. 70, sec. 1. Offences committed by them are triable in England, 11 & 12 Wm. III, c. 12: 13 Geo. III, c. 63, s. 39: 21 Geo. III, c. 70, secs. 4, 5, 7. As to the exemption of the Governors and

Councils of Fort St. George and Bombay, see 37 Geo. III, c. 142, s. 11, and 39 & 40 Geo. III, c. 79, s. 3. As to the Judges of the Supreme (High) Courts, see 13 Geo. III, c. 63, ss. 17, 39: 37 Geo. III, c. 142, s. 11. As to the procedure in Parliament against Indian offenders, see 24 Geo. III, sess. 2, c. 25, secs. 64-85: 26 Geo. III, c. 57, secs. 1-28.

² As to these messengers and their domestic servants, see 7 Ann. c. 12, secs. 3, 4, 6. The N. Y. Penal Code, sec. 27, expressly exempts ambassadors, their families, secretaries, messengers and servants, and the Indian Courts would probably hold them to be privileged by the law of nations.

³ They were expressly repealed by Act XVII of 1862, but, of course, with proper savings as to offences committed before Jan. 1, 1862.

⁴ 1 All. 599, 601; and see 2 Cal. 225.

⁵ This extends to illegal omissions, sec. 32.

dominions of any Native prince or foreign state in alliance with the Queen.

The effect of the words 'by any law passed' etc. is apparently to restrict the operation of section 3 to the classes specified in the Foreign Jurisdiction and Extradition Act, XXI of 1879, and the Criminal Procedure Code, that is to say, European British subjects committing offences in allied States in India, and Native Indian subjects of Her Majesty committing offences at any place outside British India.

Act XXI of 1879, sec. 9, declares that—'when a European British subject¹ commits an offence in the dominions of a Prince or State *in India* in alliance with Her Majesty, or when a Native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found': provided that the Political Agent, if any, for the territory in which the offence is alleged to have been committed certifies that the charge ought to be inquired into in British India. The Criminal Procedure Code, Act X of 1882, sec. 188, contains a like provision.

This, it will have been seen, does not include (a) European British subjects who are not servants of the Queen and commit offences outside the limits of British India and of allied Indian States, as, for instance, on the high seas, and (b) foreigners who commit offences in foreign states, even though those offences take effect, or have a continuing operation, in British India. For the law (where there is any) applicable to such cases we must look to the following Charters and Acts of Parliament:—

1. The Charters and Acts conferring Admiralty jurisdiction on the late Supreme and present High Courts at Calcutta, Madras, and Bombay, (33 Geo. III, c. 52, sec. 156: 33 Geo. III, c. 155, sec. 110: 9 Geo. IV, c. 74, sec. 25: 12 & 13 Vic. c. 96: 13 & 14 Vic. c. 26: 24 & 25 Vic. c. 104, sec. 9: 26 & 27 Vic. c. 24: 30 & 31 Vic. c. 45; and the Letters-Patent of 1865, secs. 32 and 33), and on the Mufassal Courts (12 & 13 Vic. c. 96, and 23 & 24 Vic. c. 88), or regulating that jurisdiction. See also the Merchant Shipping Act (17 & 18 Vic. c. 104, sec. 267, and 30 & 31 Vic. c. 124, sec. 11) as to offences committed by masters, seamen, and apprentices on British ships, and 18 & 19 Vic. c. 91, sec. 21, as to all British subjects;

2. The Colonial Courts Act (37 & 38 Vic. c. 27), sec. 3;

3. The Slave-trade Act (39 & 40 Vic. c. 46); and

¹ As defined in the Code of Criminal Procedure.

4. The Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vic. c. 73).

Law applicable to extra-territorial offences.

The law applicable to extra-territorial offences depends on the Statute or Act under which they are tried. Thus in cases coming under the Slave-trade Act, the Penal Code, sec. 4, Act XXI of 1879, sec. 8, or Act X of 1882, sec. 18, the law applicable is the Indian Penal Code. But in cases coming within the Admiralty jurisdiction of the High Courts the English criminal law applies generally¹. There is, however, a distinction in cases of homicide, according as the death happened on land or at sea. When any one dies in India of a stroke etc. inflicted within the Admiralty jurisdiction, every offence committed in respect of such case may be dealt with as if it had been wholly committed in India. But when the death occurs at sea, or within the Admiralty jurisdiction, then 'such offence shall be held, for the purpose of this Act, to have been wholly committed upon the sea' (12 & 13 Vic. c. 96, sec. 3). 'In the former case, apparently,' says Mr. Mayne, 'the criminality would be tested by the Penal Code; in the latter by the criminal law of England.' Moreover, as to the punishment following on conviction, the Colonial Courts Act provides that when, by virtue of any existing or future Act of Parliament, any person is tried in a British Indian Court for any extra-territorial offence, he shall be liable to such punishment as might have been inflicted upon him if the offence had been committed within British India and the local jurisdiction of the Court, and to no other punishment; and that if the offence is not punishable by the law of British India, the offender shall be liable to such punishment (other than death) as seems to the Court most nearly to correspond to the punishment to which he would have been liable in case he had been tried in England.

Extradition.

Where foreigners have committed certain crimes outside British India and are arrested within British India they may be delivered up in pursuance of an international compact².

Acts saved.

Section 5 saves 3 & 4 Wm. IV, c. 85, and all subsequent Acts of Parliament relating to India. It also saves the Mutiny Act³. It saves, lastly, special and local laws, which contain criminal enactments, and of which the principal appear in the following lists:—

¹ 7 Bom. H. C. Cr. Ca. 128: 1 Ben. O. Cr. 1: Mayne, P. C. (12th ed.), 14, 15.

² See the Extradition Acts, 33 & 34 Vic. c. 52, 36 & 37 Vic. c. 60 and c.

88, s. 27, and the Indian Acts XXI of 1879 and IV of 1880.

³ The Army Act, 1881, 44 & 45 Vic. c. 58.

SPECIAL LAWS.

- Administrator General (II of 1874, secs. 12, 47, 61).
 Arms Act (XI of 1878).
 Articles of War (V of 1869).
 Breach of Artificers' Contracts (XIII of 1859).
 Cantonments (III of 1880).
 Cattle-trespass (I of 1871).
 Companies (VI of 1882, secs. 22, 35, 57, 66, 68, 69, 71, 75, 79, 80, 84, 86, 161, 215, 217, 252).
 Contagious Diseases (XIV of 1868).
 Coroners (IV of 1871, X of 1881).
 Criminal Tribes (XXVII of 1871, VII of 1876).
 Customs (VIII of 1878).
 Deserters (10 & 11 Vic. c. 62, secs. 9, 10, 12-17; 15 & 16 Vic. c. 26: Act XI of 1856).
 Dramatic Performances (XIX of 1876).
 Elephants (VI of 1879, III of 1883).
 Emigration (XXI of 1883).
 European Vagrancy (IX of 1874, secs. 14, 19-29).
 Excise on Spirits (XVI of 1863).
 Explosives (IV of 1884).
 Extradition (XXI of 1879, IV of 1880).
 Factories (XV of 1881).
 Female Infants (VIII of 1870).
 Forfeiture by Mutineers (XXV of 1857).
 Foreigners (III of 1864).
 Foreign Jurisdiction (XXI of 1879).
 Foreign Recruiting (IV of 1874).
 Forests (VII of 1878).
 Fugitive Offenders (44 & 45 Vic. c. 69).
 Income-tax (II of 1886, secs. 34-37).
 Indian Marine (47 & 48 Vic. c. 38).
 Insane Offenders (14 & 15 Vic. c. 81).
 Insolvency (11 & 12 Vic. c. 21, secs. 34, 50, 58, 69, 70; XIV of 1882, sec. 359).
 Legal Practitioners (XVIII of 1879).
 Majority (IX of 1875).
 Marriages (III and XV of 1872).
 Merchant Seamen (XIII of 1876).
 Merchant Shipping (18 & 19 Vic. c. 91, 25 & 26 Vic. c. 63, 30 & 31 Vic. c. 124, Acts I of 1859, VII of 1880, V of 1883).
 Native Passenger Ships (VIII of 1876).
 Obstructions in Fairways (XVI of 1881).
 Opium (I of 1878).
 Paper Currency (XX of 1882).
 Passengers in Ships (16 & 17 Vic. c. 84, Acts VIII of 1876, XVII of 1883).
 Penal Servitude (XXIV of 1855).
 Petroleum (VIII of 1881).
 Police (V of 1861).
 Ports (XII of 1875, XVII of 1882).
 Post Office (XIV of 1866).
 Prisoners (V of 1871, IX of 1882).
 Public Servants (XXXVII of 1850).
 Quarantine (I of 1870).
 Railways (IV of 1879, IV of 1883).
 Reformatory Schools (V of 1876).
 Registration of documents (III of 1877).
 Salt (XII of 1882).
 Sarais and Puraos (XXII of 1867).
 Ship-Registry (X of 1841).
 Ships, Destruction of, 24 & 25 Vic. c. 97, secs. 42, 43, 56.
 Slave-Trade (39 & 40 Vic. c. 46).
 Soldiers' Arms (VII of 1867).
 Stamps (I of 1879).
 State Offences (XI of 1857).
 State Prisoners (III of 1858).
 Steam-Vessels, Inland (VI of 1884).
 Telegraph (XIII of 1885).
 Treasure Trove (VI of 1878).
 Volunteer Corps (XX of 1869).
 Weights and Measures (XXXI of 1871).

¹ This Act, framed by General Strachey, has, unfortunately, not yet been brought into force by the Executive.

LOCAL LAWS.

(a) Madras Presidency.

- Boats (IV of 1842, Mad. Act I of 1877).
 Canals and Ferries (Mad. Acts I of 1870, IV of 1878).
 Coffee-Stealing (Mad. Act VIII of 1878).
 Conservancy (Mad. Act III of 1871).
 Embezzlement by public servants (Mad. Reg. IX of 1822).
 Emigration (Mad. Act V of 1866).
 Excise (XIX of 1852, Mad. Act III of 1864).
 Forests (Mad. Act V of 1882).
 Hackney-Carriages (Mad. Act III of 1879).
 Local Funds (Mad. Acts IV of 1871, I of 1878).
 Madras Pier (Mad. Acts V of 1863, VII of 1871).
 Military Cantonments (Mad. Act I of 1866).
 Mopla Outrages (XX of 1859).
 Municipalities (Mad. Acts I and IV of 1884).
 Offensive Weapons in Malabar (XXIV of 1854).
 Petty Thefts (Mad. Regs. XI of 1816, IV of 1821).
 Police (XXIV of 1859, Mad. Acts V of 1865 and VIII of 1867).
 Police in Ports (Mad. Act I of 1881).
 Regimental necessaries (Mad. Reg. XIV of 1832).
 Rivers-conservancy (Mad. Acts VI of 1884 and II of 1885).
 Salt (Mad. Acts VI of 1871, II and VI of 1878, I and IV of 1882).
 Widow-burning (Mad. Reg. I of 1830).

(b) Bombay Presidency.

- Boilers, Inspection of (Bom. Act V of 1873).
 Excise (Bom. Act V of 1878).
 Ferries (Bom. Acts II of 1868 and II of 1878).
 Gambling (Bom. Act. III of 1866).
 Hackney Carriages (Bom. Act. VI of 1863).
 Inoculation (Bom. Acts I of 1877, IV of 1879).
 Markets and Fairs (Bom. Act IV of 1862).
 Military Cantonments (Bom. Act III of 1867).
 Municipal Acts (Bom. Acts III of 1872, IV of 1878).
 Poisons (Bom. Act VIII of 1866).
 Police (Bom. Acts VII and VIII of 1867, I of 1876).
 Sanitary Regulation (Bom. Act VI of 1867).
 Sind Frontier (Reg. V of 1872).
 Spirits (Bom. Reg. XXI of 1827).
 Steamers, Survey of (Bom. Acts II of 1864, and IV of 1873).
 Tramways, Karachi (Bom. Act II of 1883).
 Vaccination (Bom. Act I of 1877, IV of 1879).

(c) Lower Provinces.

- Coolies, Darjiling and Kurseong (Ben. Act V of 1883).
 Cruelty to Animals (Ben. Act I of 1869).
 Embankments and Watercourses (Ben. Act II of 1882, secs. 75-79).
 Excise (Ben. Acts VII of 1878, I of 1883).
 Ferries (Ben. Act I of 1885, secs. 23-30).
 Frontier Police, Chittagong Hill Tracts (Reg. III of 1881).
 Furnaces (Ben. Act II of 1863).
 Gambling (Ben. Act II of 1867).
 Hackney Carriages (Ben. Act V of 1866).
 Howrah Bridge (Ben. Act IX of 1871).
 Inland Emigration (I of 1882).
 Inoculation (Ben. Act IV of 1865).
 Irrigation (Ben. Act III of 1876).
 Jails (Ben. Act II of 1864).
 Jute-Warehouses (Ben. Act IV of 1883, secs. 10-15, 23, 26).

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| Municipalities (Ben. Act III of 1884). | Steamers, Survey of (Ben. Acts V of 1862 and I of 1868). |
| Native Officers of Courts (Ben. Reg. III of 1827). | Steam-Boilers (Ben. Act III of 1879). |
| Police (Ben. Acts II and IV of 1866, VII of 1869). | Tolls on Canals (Ben. Act V of 1864). |
| Ports (Ben. Act III of 1867). | Tramways (Ben. Act III of 1883, secs. 29-35). |
| Registering births and deaths (Ben. Act IV of 1873, secs. 9, 10). | Widow-burning (Ben. Reg. XVII of 1829). |

(d) North-Western Provinces.

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| Embezzlement (Ben. Reg. XXXIII of 1803). | Municipalities (XV of 1873, XV of 1883). |
| Excise (XXII of 1881, VI of 1885). | Native Officers of Court (Ben. Reg. III of 1827). |
| Ferries (XVII of 1878, III of 1886). | Police (XVI of 1854, XVI of 1873). |
| Gambling (III of 1867). | Prisons (XXVI of 1870). |
| Inland Emigration (I of 1882). | Tolls on Ganges (II of 1867). |
| Glanders and Farcy (XX of 1879). | Vaccination (XIII of 1880). |
| Inoculation (XXIV of 1868). | Widow-burning (Ben. Reg. XVII of 1829). |
| Irrigation (VIII of 1873). | |
| Mirzapur Stone Mahál (V of 1886). | |

(e) Panjáb.

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| Excise (XXII of 1881, VI of 1885). | Lahore tramways (I of 1886). |
| Ferries (XVII of 1878, III of 1886). | Municipalities (XIII of 1884). |
| Frontier (Reg. I of 1872). | Murderous Outrages (XXIII of 1867, continued by IX of 1877). |
| Gambling (III of 1867). | Prisons (XXVI of 1870). |
| Glanders and Farcy (XX of 1879). | Vaccination (XIII of 1880). |
| Hackney Carriages (XIV of 1879). | |
| Irrigation (VIII of 1873). | |

(f) Oudh.

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| Excise (XXII of 1881). | Inland Emigration (I of 1882). |
| Ferries (XVII of 1878, III of 1886). | Irrigation (VIII of 1873). |
| Gambling (III of 1867). | Municipalities (XV of 1883). |
| Glanders and Farcy (XX of 1879). | Prisons (XXVI of 1870). |
| Hackney Carriages (XIV of 1879). | Vaccination (XIII of 1880). |

(g) Central Provinces.

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| Excise (XXII of 1881, VI of 1885). | Irrigation (VIII of 1873). |
| Ferries (XVII of 1878, III of 1886). | Municipalities (XI of 1873). |
| Gambling (III of 1867). | Prisons (XXVI of 1870). |
| Glanders and Farcy (XX of 1879). | Vaccination (XIII of 1880). |
| Hackney Carriages (XIV of 1879). | |

(h) Burma.

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| Coast-Lights (IX of 1879). | Fisheries (VII of 1875). |
| Embankments (XIII of 1877). | Forests (XIX of 1881). |
| Excise (XXII of 1881, VI of 1885). | Gambling (III of 1867, XVI of 1884). |
| Ferries (II of 1873). | |

Glanders and Farcy (XX of 1879).	Rangoon Waterworks (XIX of 1884).
Hackney Carriages (XIV of 1879).	Steam-boilers (XVIII of 1882, I of 1885).
Municipalities (XVII of 1884).	Steamers, Survey of (XVI of 1871).
Pegu and Sittang Canal (II of 1881).	Vaccination (XIII of 1880).
Prisons (XXVI of 1870).	
Rangoon Port (XV of 1879).	

(d) *Coorg.*

Excise (XXII of 1881).	secs. 16 and 21).
Glanders and Farcy (XX of 1879).	Prisons (XXVI of 1870, II of 1871).
Hackney Carriages (XIV of 1879).	Vaccination (XIII of 1880).
Land-Revenue (Reg. III of 1880,	

(j) *Ajmer and Merwāra.*

Excise (XXII of 1881, VI of 1885).	Hackney Carriages (XIV of 1879).
Ferries (XVII of 1878, III of 1886).	Municipalities (XV of 1873).
Forests (Reg. VI of 1874).	Prisons (XXVI of 1870).
Gambling (III of 1867).	Salt (Reg. I of 1879).
Glanders and Farcy (XX of 1879).	Vaccination (XIII of 1880).

(k) *Andaman and Nicobar Islands.*

Coast-Lights (IX of 1879).	Peace and Government (Reg. III of 1876, Reg. I of 1884).
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(l) *Assam.*

Ferries (XVIII of 1878, III of 1886).	Prisons (XXVI of 1870, Reg. II of 1875).
Frontier Police (Reg. II of 1882).	Rural Police (Reg. I of 1883, sec. 20)
Gáro Hills (Reg. I of 1882).	Vaccination (XIII of 1880).
Glanders and Farcy (XX of 1879).	Whipping (Reg. III of 1875).
Hackney Carriages (XIV of 1879).	
Inland Emigration (I of 1882).	

Though an offence is expressly made punishable by one of these special or local laws, it will also be punishable under the Code, if the facts show that it is an offence under the Code¹. But of course a person cannot be punished for the same offence twice, under the Code and also under a special or local law².

Chap. II.

Chapter II, 'General Explanations,' is for the most part an elaborate interpretation clause, but begins with a section which should properly commence or end Chapter IV, and contains four sections (34, 35, 37, 38) which, as they relate to conspiracy, should properly be placed along with the provisions as to abetment and concealment. Sir James Stephen suggests that the object of Chapter II is to prevent captious judges from wilfully

¹ 6 Mad. 249, and see Mayne, P. C. 17, citing Madras Rulings, 1865, on Act X of 1841, sec. 5.

² 5 N. W. P. 49.

misunderstanding the code and cunning criminals from evading its provisions.

Of the definitions, the most important is that of 'offence,' which, Definitions. in its present amended form, provides for a large number of cases omitted by the Code as passed; but still is defective in not declaring that in certain sections (e.g. 216, 221, 224, 225) 'offence' shall include acts or omissions punishable by the law of England. Thus if a British sailor committed a murder on the high seas, when he reached Madras a public servant could not be charged under sec. 221 for omitting to apprehend him, nor could the sailor or any friend of his be charged under sec. 224 or sec. 225 for resisting apprehension, nor could he be charged under sec. 216 for escaping from custody, nor could any one be convicted under that section for harbouring him¹. The definition of 'human being' should exclude a child not wholly born; and that of 'animal,' (sec. 47,) which, according to Sir James Stephen, includes 'an angel, frogspawn, and perhaps a tree,' should run thus: 'The word "animal" does not include a human being.' Other definitions not contained in this chapter, are those of 'criminal force' (sec. 350), 'thug' (sec. 310), 'abduction' (sec. 362), 'affray' (sec. 159), 'aiding' (sec. 107, expl. 2), 'cheating' (sec. 415), 'coin' (sec. 230), etc. Of these the first should be transferred to Chapter II.

Some of the expressions found in the Code, which involve moral considerations, are defined with exactness. For instance, 'wrongful gain' (sec. 23), and 'dishonestly' (sec. 24). But 'fraudulently' (sec. 25) is defined imperfectly, and 'corruptly' (secs. 196, 198, 200, 219, 220), 'deceitful' (sec. 362), 'immoral' (secs. 361, 372, 373), 'maliciously' (secs. 219, 220), 'malignantly' (secs. 153, 270), 'negligently' (secs. 129, 223, 282, 284-289), 'negligent' (sec. 304 A), 'rash' (secs. 279, 304 A), 'rashly' (secs. 336-338), and 'wantonly' (sec. 153), are not defined at all. 'Corruptly' is applied to the doing of acts with the intent of gaining some advantage inconsistent with official duty or the rights of others. 'Corruption' includes bribery, but is more comprehensive². 'Malice,' or 'maliciously,' according to Mr. Justice Holmes, imports not only that a wish for the harmful effect is the motive for the act, but also that the harm is wished for its own sake³. 'Malignantly' I find nowhere defined: in secs. 153, 270 it seems to imply extreme malice. 'Negligent' and 'negligently' import 'an acting without consciousness that an illegal or mischievous effect will follow and without such attention to the nature or probable consequences of

¹ Mayne, P. C. 199.

² Livingston's Works, ed. Chase, II. 645.

³ The Common Law, p. 52: compare the N.Y. Penal Code, § 718 (3).

the act as a prudent man ordinarily bestows in acting in his own concerns¹. 'Rash' and 'rashly' imply, according to Holloway J., acting with the consciousness that mischievous and illegal consequences may follow, but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening.

Illustrations.

The section (27) relating to possession will be considered infra, when we come to deal with Theft.

In this chapter we first meet with the illustrations so characteristic of Indian legislation. Their object has been explained in the general introduction. It will be remembered that they make nothing law which would not be law without them; but that they rank as cases decided, by the highest authority, upon the provisions of the enactment in which they occur².

Grounds excluding punishment.

Command of the State.

Accident.

Tender age, idiocy, lunacy.

Chapter IV, entitled 'Of General Exceptions,' states the facts which negative responsibility, or justify acts otherwise criminal, and thus obviates the necessity of repeating in every penal clause a considerable number of limitations. Most of these 'exceptions' require no explanation or defence. Sec. 79 excludes responsibility in the case of persons who are, or who justifiably believe themselves to be, acting under the authority of law. Sec. 80 deals with *casus*, and rests on the theory that when there is no voluntary connection between the act and its author there can be no responsibility. It would cover a murder or grievous hurt committed by a somnambulist, or that of a mother overlaying her child, provided of course no negligence on her part be proved. The Code says nothing of *vis major naturae*. Here, too, there would be no responsibility. Sec. 81 seems to mean that where *A*, reasonably believing that injury to either *B* or *C* is inevitable, honestly does that which he thinks will cause the smallest amount of harm, *A* is not liable for the harm actually caused. Secs. 82-85 exclude responsibility in the case of children, idiots, lunatics, imbeciles, monomaniacs, and intoxicated persons when the intoxication is produced without their knowledge or against their will. This rests on the theory that the subject of a criminal action must not only be capable of willing, but he must also know what he is doing and be able to judge of the consequences of his act. But sec. 86 is a rider to sec. 85, and declares that where an act is not an offence unless 'done with a particular

¹ N. Y. Penal Code, § 718, cl. (1). Negligence and rashness are considered from a jurist's point of view by Prof. Holland, *Jurisprudence*, 3rd ed., pp. 93, 94, and Dr. Markby, *Elements of Law*, 3rd ed., §§ 226, 679 et seq.

² 1 Bom. 155, per West J.; who adds that every authority may sometimes err.

knowledge or intent,' the actor, if voluntarily intoxicated, shall be deemed to have had 'the same knowledge as *he would have had*' if he had been sober. This section should be redrawn and transferred to the Evidence Act, or the Code of Criminal Procedure. Its effect is, according to an able commentator on the Penal Code, to declare that, where from a given state of facts the law assumes a particular knowledge, or that knowledge is a matter of necessary inference, intoxication cannot be set up as a defence; but that where it is incumbent on the prosecution to make out specific knowledge of a particular fact, and the circumstances raise no necessary inference of that knowledge, then evidence of intoxication is admissible¹. The section is extremely obscure, and was not contained in the Code as settled by Macaulay². To me it seems intended to express the doctrine of *R. v. Cruise* (8 C. & P. 546), which is thus worded by Sir James Stephen: 'If the existence of a specific intention is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention³.' There is no exception in favour of deaf-mutes.

¹ Mayne, P. C. 74. Dr. Markby (*Elements of Law*, 3rd ed. § 751) thinks that 'a drunken man who takes a counterfeit coin, which he would certainly have discovered to be counterfeit if he had been sober, and pays it away without discovering it, might under this provision [sec. 86] be convicted of passing counterfeit coin knowing it to be counterfeit. But this result seems very remarkable.' So remarkable that it is hard to suppose that the legislature can have intended it. In the case put by Dr. Markby, evidence that the accused was drunk, and therefore did not and could not examine the coin, ought to be, and I think would be, admissible.

² His provision on the subject was simply this:—'68. Nothing is an offence which a person does in consequence of being, at the time of doing it, in a state of intoxication, provided that either the substance which intoxicated him was administered to him without his knowledge or against his will, or that he was ignorant that it possessed any intoxi-

cating quality.' The words italicised meet a case for which the Code as passed does not expressly provide. The Code Pénal has no provision on the subject, and it seems from a note in Gilbert's edition of Sirey's Codes Annotés (Paris, 1854, p. 377) that the Cour de Cassation does not admit that intoxication is a defence. The Strafgesetzbuch, § 51, tries to deal in three lines not only with intoxication but with mental unsoundness: 'A criminal act is not committed if the actor was at the time he committed the act in a state of unconsciousness (*bewusstlosigkeit*) or morbid disturbance of mental activity (*krankhafter störung der geistesthätigkeit*), where-by his free volition (*seine freie willensbestimmung*) was excluded.'

³ A Digest of the Criminal Law, 3rd ed. p. 22. Compare the New York Penal Code, as amended 1882, 1885, § 22: 'No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular

Consent. The meaning and the ground of the rules contained in secs. 87, 88, 89, 92, which deal with the subject of consent, may not be obvious at first sight. 'We conceive,' said the Commissioners, 'the general rule to be that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life¹ is concerned². Both the general rule and the restrictions may, we think, be easily vindicated. . . .

'The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true, that in the vast majority of cases, they judge better of their own interest than any lawgiver, or any tribunal, which must necessarily proceed on general principles and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals, can judge for them. . . .

'It is chiefly, we conceive, for this reason that almost all Governments have thought it sufficient to restrain men from harming others, and have left them at liberty to harm themselves.

'But though in general we would not punish an act on account of any harm which it might cause to a person who had consented to suffer that harm, we think that there are exceptions to this rule, and that the case in which death is intentionally inflicted is an exception. . . .

'It seems to us clear, therefore, that no consent ought to be a justification of the intentional causing of death. Whether such intentional causing of death ought or ought not to be punished as murder is a distinct question; and will be considered elsewhere.'

The next point which the Commissioners consider is how far consent ought to be a justification of the causing of death, when that causing of death is, in their nomenclature, voluntary, yet

purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which

he committed the act.'

¹ Or freedom? compare sec. 370.

² According to German jurists, the phrase *volenti non fit injuria* applies only to the narrow circle of goods over which a man has free power; Drage, *Criminal Code*, 47.

not intentional, that is to say, when the person who caused the death did not mean to cause it, but knew that he was likely to cause it. Consent.

'In general,' they say, 'we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer'. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labour under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigour. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely to cause it. Again; if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death.'

Sec. 88 therefore declares that it shall be no offence to do even what the doer knows to be likely to cause death if the sufferer, being of ripe age, has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but on the contrary intended in good faith the benefit of the sufferer.

The cases to which secs. 89 and 92 relate bear a close affinity to those which have just been considered. Consent of guardian.

¹ i. e. under the Code as settled by Macaulay. Under the Code as passed, the incendiary seems only guilty of culpable homicide not amounting to murder, unless he knew death to be the most probable result of his act.

'A lunatic may be in a state which makes it proper that he should be put into a strait waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is by our definition voluntarily to cause grievous hurt, and, as sharp instruments are used, is a very highly penal offence.' The Code, therefore, provides by sec. 89 that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.

Sec. 90 deals with consent given under fear of injury or misconception of fact, or by a person unable to understand the nature and consequences of the act consented to. One (perhaps unintended) effect of this section is that sexual intercourse with a woman is rape (sec. 375) if her consent is merely physical.

Compulsion.

Sec. 94 treats of compulsion by threats of instant death, and is founded on the theory that a crime is an act determined by the will, and therefore freedom of action is a necessary condition. Persons committing murder, or offences against the State punishable with death, and under certain circumstances a dacoit, are deprived of the benefit of this section, which differs from the English law on the subject. For in England a threat either of instant death or of grievous bodily harm from a person actually present at the commission of an offence would be an excuse for certain kinds of treason: provided (a) that the person under compulsion believes that such threat will be executed; and (b) that he was not a party to any association or conspiracy, the being party to which rendered him subject to such compulsion¹. But it would not, apparently, be an excuse for committing rape or arson. When a married woman commits certain crimes in her husband's presence, there is no presumption, in British India, that she acted under his coercion. So under the New York Penal Code, § 24.

Acts causing slight harm.

Another novel but useful section is numbered 95, and declares that 'nothing is an offence by reason that it causes . . . any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.'

This, say the Commissioners, 'is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the

¹ Draft Criminal Code, 1879, cl. 2 (where rape is forgotten); Crim. Code (No. 2), cl. 468.

most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen into another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident; and we think it is far better expressly to except them from the penal clauses of the code than to leave it to the judges to except them in practice. For if the code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning.' In England, there is now no statutory law on the subject¹; but the Criminal Code Bill (No. 2), cl. 452, proposes to empower the Courts to refrain from passing any sentence in the case of a trivial offence. In India, where a complaint is frivolous, the magistrate may direct the complainant to pay the accused compensation not exceeding Rs. 50².

The remaining sections of Chapter IV except from the opera- Self-
tion of the penal clauses of the Code large classes of acts done in defence.
good faith for the purpose of repelling unlawful aggressions. The Code here defines the limits of the right of private defence (*nothwehr*), which extends to all offences against the person and to such offences against property as are, or probably may be, accompanied by force as distinguished from fraud³.

'It may,' say the Commissioners, 'be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side. The people are too little disposed to help themselves. The patience with which they submit

¹ At common law, a man's right not to be touched, pushed, or struck in a rude or hostile manner is not interfered with by one who is pushing his way gently in a crowd, or who touches his neighbour to attract his attention, or gives him a jocular or friendly blow, *Williams v. Jones*,

Hard. 301, cited by Holland, 'Jurisprudence,' p. 144.

² Cr. P. Code, sec. 250.

³ In the domain of criminal law this right extends to no cases not expressly defined by the law itself, 7 Mad. H. C. Rulings, xxxv.

to the cruel depredations of gang-robbers, and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time, one of the most discouraging, symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation in resisting a body of dacoits.'

The Indian Code does not except from the operation of its penal clauses acts committed in good faith from the desire of self-preservation (*nothstand*). Here it agrees with the English law as laid down in the *Mignonette* case¹. But where a man to save his own life jumps from a sinking ship into an overloaded boat and thereby causes the death of others, it has been thought that he is not punishable².

The preliminary portion of the Code may be left with the remark that there is nothing in Indian law corresponding with the English rule that the civil remedy for a wrong which also amounts to a felony is suspended till the felon has been convicted³:

PART II. OF PUNISHMENTS.

Chapter III enumerates the six kinds of punishment (death, transportation, penal servitude, imprisonment, forfeiture, fine) to which offenders are liable under the Code as passed. To these a seventh, namely whipping, has been added by Act VI of 1864, and an eighth (detention in a Reformatory) by Act V of 1876, which Act, however, has not yet been extended to many parts of India. The provisions of Act XXVII of 1871 as to the detention of criminal tribes in reformatory settlements apply only to the North-Western Provinces, Oudh, and the Panjáb. Putting under recognizances is regarded by the Indian Legislature as a measure of prevention, not as a punishment; the provisions as to this matter are accordingly placed in the Code of Criminal Procedure, Chap. VIII.

Death.

First among the punishments provided for offences by the Penal Code stands Death. It is employed only in cases where either murder or the highest offence against the State has been committed. In no case save one (sec. 303) is it absolute, but the Court may

¹ *E. v. Dudley*, 14 Q. B. D. 273.

But see the *Strafgesetzbuch*, § 54.

² *M. & M.* 71.

³ 6 *Suth. Civ. Ref.* 9: 3 *Mad. 6:*

1 *Bom. H. C.* 2.

sentence to transportation as an alternative. When a woman sentenced to death is found to be pregnant, execution is postponed, and the High Court may commute the sentence to transportation for life¹. Death when inflicted is simple privation of life by hanging², and the body is usually delivered to the surviving relatives of the deceased. If none are forthcoming it is burnt or buried, according to his religion³.

Where any offence is punishable by transportation, the transportation as a rule must be for life. Transportation.

The consideration which chiefly determined the framers of the Code to retain that mode of punishment is the fact that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. 'The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good: and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance: but it is not so much dreaded beforehand; nor does a sentence of imprisonment strike either the offender or the bystanders with so much horror as a sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the Natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return. It is natural that his fate should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends.'

The sentence does not specify the place of transportation⁴, which is appointed by the Governor-General in Council, and directions for the removal of each convict are given by the Local Government, unless in the case of a person undergoing a previous

¹ Cr. P. C. sec. 382.

² Ibid. 368.

³ Under Act XXIII of 1867, sec. 8, the bodies of Muhammadan fanatics

sentenced to death under that Act may be disposed of as the judge directs.

⁴ Cr. P. Code, sec. 368.

sentence of transportation¹. Where an offender under the age of sixteen years is sentenced to transportation, the Court may direct that, instead of undergoing his sentence, he be sent to a reformatory school, and there detained for a period not less than two years and not more than seven².

Unlawful return from transportation is punishable under sec. 226. Section 56 provides that Europeans and Americans punishable with transportation shall be sentenced to penal servitude instead of transportation, according to the provisions of Act XXIV of 1855.

Penal
servitude.

Sentences to this punishment are carried out in such prisons within British India as the Governor-General in Council from time to time directs; and he may grant to convicts sentenced to be kept in penal servitude licences to be at large during such portion of the term of servitude and on such conditions as he thinks fit³. Breach of such conditions is punishable under the Penal Code, sec. 227.

Imprison-
ment.

Of Imprisonment there are two grades—rigorous imprisonment and simple imprisonment: the former corresponds with the English imprisonment with hard labour, the latter with imprisonment without hard labour.

Imprisonment is rigorous in the case of the offences mentioned in sections 194, 226, 364, 382, 392–396, 399–402, 412, and 449. It is simple in the case of the offences mentioned in sections 129, 163, 165, 166, 168, 169, 172–180, 187, 228, 291, 309, 358, 500–502, 509, and 510. It is simple, also, when the Court imposes it in default of payment of a fine (Act VIII of 1882, sec. 3), or for failure to give security to keep the peace (Act X of 1882, sec. 123). In all other cases it is either rigorous or simple, or partly rigorous and partly simple (section 60) at the discretion of the Court. And whenever the Court has power to sentence to rigorous imprisonment, it may order that the offender be kept in solitary confinement during a certain portion of his imprisonment (secs. 73, 74)⁴.

In all cases of imprisonment the following rules apply:—

(a) The term is to be calculated from the date on which the sentence is passed.

(b) The law neglects fractions of a day.

(c) A calendar month expires at midnight of the day of the next

¹ Act IX of 1882.

² Act V of 1876, sec. 7. 'Court' here means 'High Court,' 'Court of Session,' 'Magistrate of the First Class,' and in the Presidency towns,

'Magistrate of Police or Presidency Magistrate.'

³ Act V of 1871, secs. 21, 23.

⁴ Compare 7 Will. IV & 1 Vic. c. 90, sec. 5.

following month numerically corresponding with the day from which it counts as having commenced: and if there is no day so corresponding, then at midnight of the last day of the next following month¹.

(d) Except in the cases provided for by the Criminal Procedure Code, secs. 35, 396, 397, the imprisonment should commence when sentence is passed.

(e) Except in case of an appeal, imprisonment which is to commence at once cannot be suspended².

(f) The period during which a sentence may be suspended pending appeal is not to be reckoned in calculating the term, if the appeal is rejected³.

(g) The Local Government, or (subject to its control) the Inspector-General of Jails, may order any person sentenced to imprisonment to be removed during the term from the jail in which he is confined to any other jail within the territories subject to the same Local Government⁴. And under 14 & 15 Vic. c. 81 prisoners acquitted or not tried on the ground of insanity may be removed from India to any part of the United Kingdom, there to abide Her Majesty's order concerning their custody⁵.

Total Forfeiture of Property is a punishment inflicted only on persons guilty of an offence punishable with death, and of the high political offences mentioned in secs. 121 and 122. The territorial possessions of such persons often enable them to disturb the public peace and to make head against the Government; it seems reasonable that they should be deprived of so dangerous a power.

Partial Forfeiture of Property may be inflicted for the minor political offences mentioned in secs. 126 and 127, and for the fraudulent transfers and claims mentioned in 206 and 207.

The effect of section 62 is, says Mr. Mayne⁶, to combine, for the benefit of the Government⁷, the English doctrines of forfeiture and escheat. But forfeiture under the Code does not corrupt the blood; the Government takes nothing which the offender could not have assigned. When therefore a sentence of forfeiture is passed on the father of a Hindu undivided family subject to the

¹ Thus, a month's imprisonment given on the 31st January would count from midnight on the 30th January and expire at midnight of the 28th February or (in leap-year) of the 29th February.

² 3 Ben. App. Cr. 50 (S. C. 12 Suth. Cr. 47).

³ Mayne, P. C. 33.

⁴ Act V of 1871, sec. 20.

⁵ See also the Colonial Prisoners Removal Act, 1884 (47 & 48 Vic. c. 31).

⁶ P. C. 35.

⁷ 21 & 22 Vic. c. 106, sec. 39. The Governor-General in Council may grant property forfeited or escheated, 16 & 17 Vic. c. 95, sec. 27.

Mitákshará, the rights of his sons who take as his co-heirs are not affected. How this would be in the case of an impartible zamíndárí descending always to the eldest son, seems doubtful¹.

Forfeiture under sec. 62 must be adjudged as part of the sentence.

Fine.

The sixth class of punishment to which an offender is liable under the Code is Fine. The Courts are authorised to inflict it in every case, except where forfeiture of all property is necessarily part of the punishment. This punishment is open to some objections. 'Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine the case is different. In imposing a fine it is always necessary to have as much regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich zamíndár.'

As to the limiting of fines the Code provides (section 63), in imitation of the Bill of Rights, that where no sum is expressed to which a fine may extend the amount is unlimited but shall not be excessive. In cases which are not very heinous the Code limits the amount of fine which the Courts may impose, but in serious cases the amount is left absolutely to their discretion: misuse of this discretion may be remedied by appeal.

When more offenders than one are fined, the Court must impose a specific fine upon each², and where the Code provides that an offender shall be punished with imprisonment and shall also be liable to fine (*infra*, p. 26) the sentence must inflict some period of imprisonment, if only a moment³.

Fines when recovered belong to the Government; but the Code of Criminal Procedure, sec. 545, empowers the Court imposing or confirming a sentence of fine to order the fine to be applied in defraying the expenses of prosecution and in compensation for the injury caused by the offence.

Sections 64 to 70 contain the measures to be adopted in default of payment for a fine. The Code directs that at the time of imposing a fine 'the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In

¹ The Calcutta High Court (13 Ben. 445, 460, S. C. 22 Suth. 17, 21) held that in such a case the zamíndár represented the whole estate. But

see Mr. Mayne's remarks, P. C. 36.

² 5 Mad. H. C., Appendix v.

³ 1 Bom. H. C. 4, 34, 39; 4 Mad. H. C., Appendix xviii-xix.

fixing this term the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which, by the Code, is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.' But this imprisonment is not taken in full satisfaction of the fine. The offender cannot be allowed to choose whether he will suffer in his person or in his property. To adopt such a course would be to exempt from the punishment of fine those very persons who dislike that punishment most, and who the apprehension of a fine would be most likely to restrain.

The imprisonment which an offender has undergone does not release him from the pecuniary obligation under which he lies. Sec. 70 provides that at any time during a certain limited period the fine may be levied on his effects by distress, and if the fine is paid or levied while he is imprisoned for default of payment the imprisonment immediately terminates (sec. 68), and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment takes place.

The framers of the Code thought it unnecessary to place in the Whipping list of punishments incapacitation for office, dismissal from office¹, degrading public exhibition², subjection to police-supervision, and flogging. In 1864, however, the Indian Legislature decided on adding the last-mentioned punishment³. The objections to it are obvious, but in the East it is not regarded as causing such indelible disgrace as it causes in Western countries. The offender is not exposed to the contaminating and unhealthy influences of an oriental gaol, his wife and children are not deprived of their breadwinner, and the public is saved the expense of maintaining him in prison. It is, moreover, as Sir Henry Maine remarked, the most strongly deterrent of known punishments.

Flogging cannot be inflicted on females, or on males of more than forty-five years of age; and the Code of Criminal Procedure (secs. 391-395) contains other provisions as to the execution of the sentence which preclude all undue severity.

¹ This may be inflicted under Act XXXVII of 1850 (*for regulating inquiries into the behaviour of Public Servants*), sec. 22.

² Confinement in the village stocks may be inflicted under Madras Reg.

XI of 1816, sec. 10. See 6 Mad. 247 : 5 Mad. H. C. Rulings, xxxiii.

³ There is also a special Regulation (III of 1875) as to whipping in the Assam Hill Districts.

**Detention
in Reform-
matory.**

The punishment of detention in a reformatory school is inflicted only on boys who, being at the time under the age of 16 years, have been convicted of any offence punishable with imprisonment or transportation. The provisions in force on this subject are contained in Act V of 1876.

**Concurrent
offences.**

Where several offences have been committed by one person before he has been punished for any of them, they are said to 'concur.' The concurrence of several criminal acts is dealt with by sec. 71 of the Penal Code and sec. 35 of the Criminal Procedure Code.

**Cumula-
tive
punish-
ments.**

Cumulative punishments are dealt with by the Criminal Procedure Code, sec. 35, and the Penal Code, sec. 112. There is no provision as to the commensurability of punishments, and the only provision as to relapse is that contained in sec. 75.

Relapse.

**Commuta-
tion of
sentence.**

Secs. 54 and 55 empower the Government of India or the local Government to commute sentences in certain cases without the consent of the offender, and a general provision as to commutation is contained in the Code of Criminal Procedure, sec. 402, which provides that the Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it: death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine. It is obviously fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Penal Code. It is also desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. 'Many circumstances of which the executive authorities ought to be accurately informed, but which must be often unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote provinces of the empire in which convict settlements are established, and the way in which the interest of those provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide.'

**Classified
list of
punish-
ments.**

As the Code often refers to classes of offences according to the punishments respectively annexed thereto, it may be useful to give here the following classified list of punishments, with the numbers of the sections under which they may, or must, be inflicted :—

I. DEATH

- (a) may be inflicted : secs. 121, 132, 194, 302, 303, 305, 307, 396.
 (b) must be inflicted : sec. 303 (murder committed by a life-convict).

II. TRANSPORTATION

- (a) for life may be inflicted: secs. 75, 121, 121 A, 122, 125, 125 A, 128, 130, 131, 132, 194, 222, 225, 226, 238, 255, 302, 304, 305, 307, 311, 313, 314, 326, 329, 304, 371, 376, 377, 388, 389, 394, 395, 396, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 477.
 (b) for life must be inflicted: secs. 226, 311.
 (c) for any term may be inflicted: sec. 124 A.
 (d) for not less than seven years and not more than the term for which the offender might be imprisoned may be inflicted: sec. 59.

III. PENAL SERVITUDE

must be inflicted whenever a European or American is convicted of an offence punishable with transportation: sec. 56.

IV. IMPRISONMENT

- (a) which may extend to fourteen years: secs. 115, 222, 392, 457, 458.
 (b) which may extend to ten years: secs. 75, 119, 121 A, 122, 123, 128, 131, 132, 194, 225, 232, 235, 238, 240, 251, 255, 304-307, 313-316, 326-329, 331, 333, 364, 366, 367, 371-373, 376, 377, 382, 386, 388, 389, 392, 394-396, 399, 400, 409, 412, 413, 436-439, 449, 450, 454, 455, 459, 460, 467, 493, 495.
 (c) which may extend to ten years and shall not be less than seven years: secs. 397, 398¹.
 (d) which may extend to seven years: secs. 115, 118, 124-127, 134, 193, 195, 201, 211, 213, 214, 216, 219-222, 225, 231, 234, 243-245, 247, 249, 256-260, 281, 308, 312, 317, 325, 330, 363, 365, 369, 370, 380, 381, 387, 393, 401, 402, 404, 407, 408, 420, 433, 435, 451, 452, 466, 468, 472-477, 494, 496, 506.
 (e) which may extend to five years: secs. 212, 239, 250, 253, 429-432, 440, 457, 497.
 (f) which may extend to four years: sec. 335.
 (g) which may extend to three years: secs. 117, 118, 124 A, 129, 133, 148, 152, 162, 164, 167, 181, 193, 201, 205, 212, 213, 214, 216, 218, 221, 222, 225, 225 A, 233, 235, 237, 242, 246, 248, 252, 261, 263, 308, 312, 324, 332, 344, 347, 348, 379, 384, 404, 406, 411, 414, 418, 419, 454, 456, 462, 469, 484, 486, 487.
 (h) which may extend to two years: secs. 135, 136, 144, 145, 147, 158, 165, 169, 170, 177, 189, 203, 204, 206-211, 215, 217, 221, 223, 224, 225, 225 A, 229, 241, 254, 262, 270, 295, 304 A, 318, 338, 343, 345, 346, 353-356, 385, 403, 421-424, 427, 428, 451, 453, 461, 465, 483, 498, 500-502, 504-507.
 (i) which may extend to one year: secs. 153, 163, 166, 168, 190, 264-267, 296, 297, 298, 309, 323, 342, 357, 374, 417, 434, 448, 482, 486, 489, 508, 509.
 (j) which may extend to six months: secs. 138, 143, 151, 153, 158, 172-179, 182, 183, 187, 188, 202, 225 B, 228, 269, 271-276, 279, 280, 282, 284-289, 291, 294 A, 337.
 (k) which may extend to three months: secs. 140, 171, 180, 186, 277, 292, 293, 294, 336, 352, 426, 447, 491.

¹ These are the only cases in which a minimum term of imprisonment is prescribed.

- (l) which may extend to one month : secs. 160, 172-176, 184, 185, 187, 188, 334, 341, 358, 490, 492.
 (m) which may extend to twenty-four hours : sec. 510.

V. FORFEITURE

- (a) all the offender's property may be forfeited : sec. 62.
 (b) all the offender's property must be forfeited : secs. 121, 122.
 (c) the rents and profits of the offender's whole estate which accrue during his transportation or imprisonment may be forfeited : sec. 62.
 (d) specific property may be forfeited : secs. 126, 127.
 (e) specific property must be forfeited : sec. 169.

VI. FINE

- (1) the only punishment—(a) unlimited : secs. 155, 156.
 (b) limited to Rs. 1000 : secs. 154, 294 A.
 (c) limited to Rs. 500 : secs. 137, 278.
 (d) limited to Rs. 200 : secs. 283, 290.
 (2) an additional punishment unlimited : secs. 115, 118, 123, 124, 126-134, 181, 193, 194, 201, 209, 211-214, 216, 221, 222, 225, 226, 231-235, 237-240, 242-253, 255-259, 302, 304-307, 309, 311-314, 316, 325-331, 333, 344, 347, 348, 363-367, 369-373, 376, 377, 380-382, 386-389, 392-396, 399-402, 404, 407-409, 412, 413, 420, 435-440, 449-460, 466-469, 472-477, 484, 493-496.
 (3) an alternative punishment, the amount being proportioned to the value of the object of the offence : sec. 254.
 (4) an alternative or additional punishment—
 (a) unlimited : secs. 116, 117, 124 A, 125, 135, 136, 138, 143-145, 147, 148, 151-153, 157, 158, 162-170, 177, 189, 190, 201-208, 210-220, 222-225 A, 225 B, 229, 260-267, 269, 270, 271, 281, 291-298, 304, 304 A, 308, 315, 317, 318, 324, 332, 343, 353-356, 374, 379, 384, 385, 403, 406, 411, 414, 417-419, 421-424, 426-434, 461, 462, 465, 482, 483, 485-487, 489, 497, 498, 500-502, 504-506, 508, 509, 511.
 (b) limited to Rs. 2000 : sec. 335.
 (c) limited to Rs. 1000 : secs. 172-179, 182, 183, 188, 228, 272-276, 279, 280, 282, 284-289, 323, 338, 342, 357, 448.
 (d) limited to Rs. 500 : secs. 140, 172-176, 180, 184, 186, 187, 277, 334, 337, 341, 352, 447.
 (e) limited to Rs. 250 : sec. 336.
 (f) limited to Rs. 200 : secs. 171, 185, 187, 188, 358, 491.
 (g) limited to Rs. 100 : secs. 160, 490.
 (h) limited to Rs. 10 : sec. 510.
 (i) proportioned to the value of the object of the offence : secs. 241, 492.

Theories of
punish-
ment.

The framers of the Code do not seem to have troubled themselves much about the rival theories of punishment, respecting which German jurists and philosophers have written so copiously. The deterrent theory is certainly followed in the section about transportation and in the Whipping Act; the reformatory theory in section 56, which incorporates by reference the Penal Servitude Act; the compensatory in the sections relating to fines coupled with the provisions in the Code of Criminal Procedure, section 545. The penalties of forfeiture and imprisonment are inflicted as means of security.

PART III. OFFENCES AGAINST THE STATE AND THE PUBLIC.

This division of the Code deals with offences committed directly against the State or community generally. It comprises eleven chapters, which deal respectively with offences relating to the following subjects:—the State; the Army and Navy; Public Tranquillity; Public Servants and their Lawful Authority; Evidence and Public Justice;—Coin and Government Stamps; Weights and Measures; Religious Feeling; Public Morality; Public Health, Safety, and Decency.

Chapter VI deals with offences against the State. It provides for waging war against the Crown without any distinction as to British subjects or otherwise (sec. 121); for conspiring to commit such offence, even though no act or illegal omission has taken place in pursuance of the conspiracy (sec. 121 A), for collecting arms etc. with the intention of committing it, and for concealing with intent to facilitate its commission; and it makes the abetting of hostilities against the Government a separate offence, instead of leaving it to the operation of the general rules laid down in the chapter on Abetment. Those rules would apply to the case of a person residing in British India who should abet a subject of the British Government in waging war against that Government, but they would not reach the case of a person residing in British India who should abet the waging of war by any foreign prince against the British Government.

The framers of the Code agreed with the great body of legislators in thinking that, though in general a person who has been a party to a criminal design which has not been carried into effect ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State: for state-crimes, and especially the most heinous and formidable state-crimes, have this peculiarity, that if they are successfully committed the criminal is almost always secure from punishment. 'The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations.' They therefore did not think it expedient to leave such plots and preparations to the ordinary law of abetment.

Secs. 125, 126, 127 provide against acts tending to interrupt the friendly relations of the State with other Asiatic powers. In connection with these provisions are the English Foreign Enlistment Act (33 & 34 Vic. c. 90), and the Indian Foreign Recruiting Act, IV of 1874. The Code has no provision against compassing the death of foreign sovereigns.

Sec. 129 punishes negligence (*culpa*) as to the custody of State-prisoners¹ or prisoners of war, when it takes the form of an official misdemeanour.

The Code contains no provision like § 329 of the German Strafgesetzbuch, for punishing persons failing to perform contracts entered into in time of war or need, for delivery to Government authorities of provisions, means of transport, etc. Nor is there any penalty for breach of official secrets, though the desirability of such a penalty has been felt by the Government of India in the Foreign Department². Nor does it provide against unauthorised borrowing from, or lending to, Native States, which is made a misdemeanour by 37 Geo. III, c. 142, sec. 28.

Chapter VII is entitled 'Of Offences relating to the Army and Navy,' and the bulk of it provides for the punishment of persons who, not being military, abet military crimes.

It is obvious that a person who, not being himself subject to military law, instigates or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But it is not desirable that the punishment of such a person should be fixed according to the principles on which the general law of abetment is framed. That law declares (section 109) that whoever abets any offence shall be punished with the punishment provided for the offence; but the military penal law is and must be far more severe than that under which the body of the people live, and the extension of such severity to persons not of the military profession would be unwarrantable.

The part of this chapter which relates to civilians who abet military crimes should be placed with the other provisions of the Code relating to abetment, and sec. 140 (as to civilians wearing a soldier's garb) should be placed with the other sections relating to personation, viz. 170, 171, 205, and 229.

Chapter VIII, entitled 'Of Offences against the Public Tranquillity,' provides for the punishment of unlawful assemblies of

Public
tran-
quillity.

¹ See Ben. Reg. III of 1818, Mad. Reg. II of 1819, and Bom. Reg. XXV of 1827, amended by Acts XXXIV of 1850 and III of 1858.

² The German rule on this subject is contained in § 353 of the Strafgesetzbuch.

persons who, whether they assemble tumultuously or otherwise, have a common unlawful purpose, the execution of which will disturb public order and excite alarm.

Chapter IX is entitled 'Of Offences by or relating to Public Servants.' These offences naturally form an important part of the Code, as the official body in India occupies a position and is charged with functions of far greater importance than those which belong to any other body of officials in the world, with, possibly, the exception of Russia¹. Chapter IX deals with two classes of offences, of which one can be committed by public servants alone, and the other comprises offences which relate to public servants, though they are not committed by them. The offences which are common between public servants and other members of the community are left to the general provisions of the Code. If a public servant embezzles public money, he is left to the ordinary law of criminal breach of trust. If he falsely pretends to have disbursed money for the public, and by this deception induces the Government to allow it in his accounts, he is left to the ordinary law of cheating. If he produces forged vouchers to back his statement, he is left to the ordinary law of forgery. There is no reason for punishing these offences more severely, when the Government suffers by them, than when private people suffer.

The fact that the transgression of a public servant may always be punished by dismissal from the public service, explains the comparative leniency of some of the punishments provided by this chapter and the absence of any notice of certain mal-practices. It will be seen that sec. 161 punishes the corruption of public servants with imprisonment for a term not exceeding three years, or with fine, or with both. The amount of fine is unlimited, and this punishment enables the judges in cases of this description to compel the delinquent to give up the whole of his ill-gotten wealth. Other offences by public servants are provided for by secs. 217-223; and under 33 Geo. III, c. 52, sec. 62, the demanding or receiving gifts by British officials in India is a misdemeanour, and the offender forfeits the gift or its value².

The giving of a bribe to a public servant is punishable as an abetment under the Code, sec. 116. The comparative leniency of the punishment provided for this offence is due to the fact that in India the receiver of the bribe is almost always

¹ Stephen, *Hist. C. L.*, iii. 308.

² See 1 Strange, *Notes of Cases* (Madras 1816), 202. In 3 & 4 Wm. IV, c. 85, sec. 76, there is a special

provision against the acceptance of gratuities by Governors-General, Governors, and members of Council.

the tempter and that the giver of the bribe is really acting in self-defence.

If the Governor-General or any other Indian official wilfully disobeys the orders of the home-authority he commits a misdemeanour¹. And any British subject resident in India who is party to a corrupt bargain for giving up or obtaining employment under Government is guilty of the same offence².

Chapter X deals with contempts of the lawful authority of public servants. Under sec. 177 may be punished the giving false information (not omission to give true information) as to births, deaths, marriages, and similar matters. The only provision in this chapter which requires explanation is that contained in section 188. The Penal Code provides laws against acts which ought to be repressed at all times and places or at times and places which the legislature can define; but there are acts which at one time and place are perfectly innocent and which at another time or place are proper subjects of punishment; nor is it always possible for the legislature to say at what time or at what place such acts ought to be punishable. The Code of Criminal Procedure therefore empowers the local authorities to forbid acts which these authorities consider as dangerous to the public tranquillity, health, safety, or convenience; and the Penal Code, section 188, makes it an offence in a person to do anything which he knows to be so forbidden and which may endanger the public tranquillity, health, safety, or convenience.

Evidence
and Public
Justice.

Chapter XI deals with offences against public justice, including the offences of giving and of fabricating false evidence. The Code treats the giving and the fabricating of false evidence in exactly the same way, and marks the grades of those offences on the principle that the law ought to make a distinction between the kind of false evidence which produces great evils and the kind of false evidence which produces comparatively slight evils. As plaints and written statements are verified by the civil suitors who present them, the Code renders punishable the deliberate assertion of falsehoods in pleadings—which, when the Code was framed, was practised in the Supreme Courts in the Presidency Towns.

Coin and
Stamps.

Chapter XII deals with offences relating to Coin and Government Stamps. The counterfeiting of the coin of the Government of India is punished more severely than the counterfeiting of foreign coin. This is not only in accordance with the general practice of Governments, but is peculiarly advisable under the

¹ 33 Geo. III, c. 52, sec. 65; 3 & 4 Wm. IV, c. 85, sec. 80.

² 33 Geo. III, c. 52, sec. 66, and see 49 Geo. III, c. 126.

present circumstances of India. It is much to be wished that the Queen's currency may supersede the numerous coinages which are issued from a crowd of mints in the dominions of the petty princes of India. This object is in some degree promoted by the Code¹. That coinage the purity of which is guarded by the most rigorous penalties is likely to be the purest, and the coinage which is likely to be the purest will be the most readily taken in the course of business.

Section 235 punishes the possession of implements necessary for coining as a *delictum sui generis*. The offence is such a serious one when consummated that the legislator is justified in departing from the general rule and punishing it in the preparatory stage².

The distinction made in sections 240, 241 between two different classes of utterers is also marked in the French Code Pénal, and is obviously agreeable to reason and justice.

'An utterer by profession, an utterer who is the agent employed by the coiner to bring counterfeit coin into circulation, is guilty of a very high offence. Such an utterer stands to the coiner in a relation not very different from that in which a habitual receiver of stolen goods stands to a thief. He makes coining a far less perilous, and a far more lucrative pursuit than it would otherwise be. He passes his life in the systematic violation of the law, and in the systematic practice of fraud in one of its most pernicious forms. He is one of the most mischievous, and is likely to be one of the most depraved of criminals. But a casual utterer, an utterer who is not an agent for bringing counterfeit coin into circulation, but who, having heedlessly received a bad rupee in the course of his business, takes advantage of the heedlessness of the next person with whom he deals to pay that bad rupee away, is an offender of a very different class. He is undoubtedly guilty of a dishonest act, but of one of the most venial of dishonest acts. It is an act which proceeds, not from greediness for unlawful gain, but from a wish to avoid, by unlawful means it is true, what to a poor man may be a severe loss. It is an act which has no tendency to facilitate or encourage the operations of the coiner. It is an occasional act, an act which does not imply that the person who commits it is a person of lawless habits. We think, therefore, that the offence of a casual utterer is perhaps the least heinous of all the offences into which fraud enters.'

Secs. 255-263 deal with offences relating to Government stamps. Stamps.

¹ See also the Native Coinage Act (IX. of 1876), which authorises the Native States to send metal to any mint in British India to be made into coin under that Act, and which is a

step towards a pure and uniform currency.

² Drage, *The Criminal Code of the German Empire*, 120.

Other penal provisions intended to protect the stamp-revenue will be found in Act I of 1879, secs. 61-68, and in the Madras Regulation V of 1831.

Weights. Chapter XIII deals with offences relating to weights and measures which are 'false,' that is which differ from those expressly or impliedly agreed upon and are substituted, or intended to be substituted, with intent to defraud, for the weights and measures agreed upon.

Religion. Chapter XV deals with offences relating to Religious Feeling. The principle on which it has been framed is this, that every man should be suffered to profess his own religion and that no man should be suffered to insult the religion of another. Most of the offences mentioned are in the nature of wanton insults to existing creeds.

The Code provides a punishment of great severity (sec. 295) for the intentional destroying or defiling of places of worship, or of objects held sacred by any class of persons. No offence in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a sacred place at Benares in 1809 caused violent tumult attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable.

This chapter also contains provisions for the purpose of protecting assemblies held for religious worship.

In drafting section 298 (as to uttering words with deliberate intent to wound religious feelings) the framers of the Code had two objects in view. 'We wish,' they said, 'to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture, or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause.' The section should be amended so as to show more clearly that it is intended to apply only to wanton insults.

Sec. 297 punishes trespass on a place of sepulture with intent to wound the feelings of any person. The same section punishes interruption of funeral ceremonies and insults offered to corpses. But there is no special provision for body-snatching or the stealing of objects belonging to a grave.

This chapter as originally framed contained clauses rendering *Caste*. punishable the intentional depriving a Hindu of his caste by assault or by deception; they were, however, afterwards struck out, presumably because the remedy by civil suit is sufficient. The practice of excommunicating Hindu widows who remarry, and their husbands and relations, is not an offence, though it goes far to nullify Act XV of 1856, and is, moreover, at variance with many sacred texts¹.

Chapter XIV purports to provide penalties for 'offences affecting *Nuisances*. the public health, safety, convenience, decency and morals.' It begins (sec. 268) with a definition of 'public nuisance,' which is followed by a declaration that a 'common nuisance' is not excused on the ground that it causes some convenience or advantage. By 'common' doubtless 'public' is meant. The punishments for committing public nuisances not specially provided for, and for continuing such nuisances after they have been prohibited by competent authority, are contained in secs. 290, 291, which ought to come immediately after sec. 268. It will be remembered that nuisances punishable under the Code may still be the subject of civil suit, before or without prosecution², and that no length of time can justify a nuisance. The other sections of this chapter provide penalties *Public* for spreading infectious disease, which are extended to two years' *health*. imprisonment if the act is done 'malignantly'; for disobeying quarantine rules; for adulterating, food, drink, and drugs (there is no provision, as there is in the German Code, § 324, for poisoning other substances, such as clothes and carpets); for selling noxious food and adulterated drugs (secs. 273, 275); for fouling the water of public springs or tanks, and for making the atmosphere noxious to health. These are the provisions of the Code relating to the public health. They are supplemented by the local laws as to inoculation and vaccination. Every one has a right that his personal safety shall not be infringed by the negligent exercise of another's rights, or what appear to be such. Secs. 279-289 accordingly *Public* safeguard the public safety by punishing mere carelessness, irre- *safety*. spectively of its results. Where the rashness or negligence causes hurt, it is punishable under sec. 337 or 338: where it causes death it is punishable under sec. 300 or 304 A. Sec. 287 (as to machinery) goes far beyond any provisions in the English or Indian Factory Acts (41 Vic. c. 16: Act XV of 1882). Secs.

¹ See the Tagore Law Lectures, 1883, p. 80, note 2.

² 1 Bom. H. C. 2.

³ Sir James Stephen says (III.

310) that in England this would not be punishable at all, and would not afford ground even for a civil action.

Public decency and morals. Unnatural Crimes.

292-294 deal with offences against public decency and morals, such as selling etc. obscene books, and singing obscene songs. And section 377, which is wrongly placed in Chapter XVII, relates to an odious class of offences respecting which it is desirable that as little as possible should be said¹. Special legislation was directed by Act XXVII of 1871 against the professional pathics of the N.W. Provinces, Oudh and the Panjáb.

Lotteries, gambling, cruelty to animals.

The provision relating to public lotteries (sec. 294 A) may perhaps be regarded as relating to public morals. When the Code is revised, sections relating to public gambling and to cruelty to animals, which not only offends humane individuals, but brutalises the public generally, should be here inserted—the local laws which deal with these subjects being repealed. There are no sections expressly relating to public ‘convenience.’

Offences relating to marriage.

Chapter XX deals with bigamy, adultery, and other offences relating to Marriage. It is framed on principles somewhat different from those of the English law on the same subject.

Sec. 498 punishes the offence committed when a man either married or unmarried induces a woman to become, as she thinks, his wife, but in reality his concubine. The form of the marriage ceremony depends on the race or religion to which the persons entering into the marriage belong. When races are mixed as in India, and religion may be changed or dissembled, this offence may be committed by a person falsely causing a woman to believe that he is of the same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which according to the law under which she lives, is valid.

There is no corresponding provision for punishing a woman who deceives a man into contracting with her a marriage which she knows to be invalid. For this offence the framers of the Code proposed a punishment which, for obvious reasons, was much less severe than that provided for a similar deception practised by a man on a woman. Their clause (467) dealing with this subject was, I know not why, omitted when their draft was revised and enacted.

Bigamy.

Sec. 494 provides a punishment for the offence known to the English law as bigamy, and sec. 495 enhances the punishment when the offence is aggravated by concealment of the fact of the former marriage. It is obvious that there is a great difference between the case of a married man, who by passing himself off as unmarried induces a modest woman to become as she thinks his

¹ It does not provide for the last offence mentioned in the N. Y. Penal Code, § 393; nor for that mentioned in the Zendavesta (*Vendidad*, VIII.

27), translated by Darmesteter, even when it is committed between two men, as seems to be contemplated by 48 & 49 Vic. c. 69, s. 11.

wife but in reality his concubine, and the case of a married man who candidly owns to a woman with whom he falls in love that he is already married, but at her request goes through the form of marriage with her.

Sec. 496 punishes every person who with a fraudulent intention—^{Fraudulently going through a marriage ceremony.} as, for instance, to enable the parties to obtain property so settled as to come to one of them on marriage—goes through the ceremony of being married, knowing that he is not thereby lawfully married.

The mere abuse of the formalities of marriage when there is no deceit practised on the woman, and no 'dishonest or fraudulent' intention, is not an offence punishable by this Code whether the ceremony partakes of this character or not.

Every husband has a right that no other man shall, by force or ^{Adultery.} persuasion, deprive him of his wife's society, still less be criminally intimate with her. This right terminates on the death of one of the parties to the marriage, or their divorce. It is infringed (a) by abducting or harbouring the wife; (b) by so injuring her as to deprive her husband of her services; and (c) by criminal intimacy with her. This last infringement is expressly dealt with by the Code, sec. 497.

This section was not in the Code as originally framed. The framers thought it best to treat adultery merely as a civil injury. The reasons were:—'first, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in cases of adultery to the courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider their wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain on their honour, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English courts is, it seems, the real gist of most proceedings for adultery in the Mufassal. The essence of the injury is considered by the sufferer as lying in the "per quod servitium amisit." Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

'These things being established it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes—those whom neither the existing punishment, nor any punishment which we should feel ourselves justified in proposing, will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.'

Those who revised Macaulay's draft, however, considered that the community generally was injured by adultery, and herein they are supported by the Penal Codes of France (art. 337, 338) and Germany (§ 172). Adultery has never in England been treated as a crime, though it is an ecclesiastical offence. 'It seems to me,' says Sir James Stephen, 'that the more marriage is recognised as a state of life into which two persons enter upon equal terms, and the less the wife is looked upon as being the husband's property, the less will people be inclined to punish as a crime, this most grievous and disgraceful of all private wrongs¹.'

It is an offence punishable under sec. 494 as to the woman, under sec. 497 as to the man, to marry the wife of a Hindú not divorced, and without the first husband's consent. A woman thus married is entitled to maintenance as a concubine².

Except on the frontiers of the Panjáb and Sind, adulteresses are not punishable either as principals or abettors.

'The condition of the women of India is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which,' said the framers of the Code, 'we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women,

¹ Hist. C. L., III. 318.

² West and Bühler, Hindu Law, 3rd ed. p. 593.

we are not inclined to throw into a scale already too much depressed the additional weight of the penal law.' On the frontiers of the Panjáb¹ and Sind², however, married women are punishable for adultery, and this is consonant with Hindu usage³.

Sec. 498 punishes the enticing or taking away, or detaining with criminal intent, a married woman from her husband or from one taking care of her in his absence. It is immaterial whether the wife is a consenting party or not.

The kidnapping of women for criminal purposes is punishable under section 366.

The Indian Code—like the French, but unlike the German—contains no provision directed against Incest, doubtless because the rules as to prohibited degrees applicable to the various classes of the Native population have never been ascertained⁴. Neither does it contain any clause dealing with the marriage of children—the cause in India of such degradation, misery, sin, crime, and physical deterioration. For the boy-husbands often die before puberty, and their widows, precluded by Native opinion from re-marriage, become, in practice, either slaves, paramours, or prostitutes. We have already, by the Indian Act XV of 1856, removed all legal obstacles to re-marriage; but the number of widows who have availed themselves of this Act is infinitesimally small. The only practical course is to limit the number of young widows. This can be done by legislating against the practice of infant marriage, which is now followed by the Brahmans and other high-caste Hindus, with the important exception of the Rājputs or Kshatriyas⁵; and the operative part of the necessary Bill might be in the following form:—

'Every marriage solemnised between Hindus after this section comes into force shall be void unless, at the date of the marriage, the husband has completed his age of sixteen years and the wife has completed her age of eleven years.

'Every party to a marriage made contrary to the provisions of this section, and every person abetting within the meaning of the

¹ Reg. I. of 1872, sec. 8.

² Reg. V. of 1872, sec. 7.

³ See Jolly, *Hindu Law of Partition*, etc., p. 78.

⁴ In the case of Europeans, East Indians, and Native Christians, as 5 & 6 Wm. IV. c. 54 does not extend to India it seems that marriage with a deceased wife's sister is, not absolutely void, but voidable during the

life of the parties, *Das Merces v. Cones*, 2 Hyde, 65; Mayne, P. C. 399.

⁵ They defer the marriage-ceremony until the bride is fit to begin conjugal life, i.e. until the age of thirteen or fourteen years, and sometimes later; see Prof. Bühler's review of the Tagore Law Lectures, 1883, in the *Oesterreichische Monatschrift für den Orient*, Jan. 15, 1885.

Indian Penal Code any such marriage, shall be liable to imprisonment for a term not exceeding one year, or to fine, or to both.'

As the Penal Code, secs. 82 and 83, would apply to the proposed section, no child under twelve would, in practice, be punishable under its provisions. But an old man who, as sometimes happens, marries a girl of eight or nine, and all persons bringing about or solemnising infant marriages, would, and rightly, incur a penalty.

As the proposed Act should be introduced cautiously and gradually, so as to avoid causing religious excitement, it might be well to make it come into force in each province on such a day as the local government notifies, and it should perhaps apply only to such classes of the Hindu population as the local government from time to time directs. When it has been completely brought into force it might be formally inserted in Chap. XX of the Penal Code. Such a measure would, I am convinced, be, if not welcomed, at least unopposed by the educated Hindus. They know perfectly well that the Vedas do not sanction the marriage of children. As Professor Bühler long since pointed out¹, among the texts recited at the marriage ceremony are some which express the belief that the bride belongs to the three gods Soma (the Moon), Gandharva, and Agni, before she passes into the possession of mortal man. *Somaḥ prathamam vivide Gandharvam vivida uttarāḥ tṛtīyo Agniḥ te patis, turyas te manushyajāḥ. Somaḥ dadad Gandharvāya, Gandharvo dadad Agnaye, rayim ca putrāṇḥ cādād Agnir mahyam atho imām*². The bridegroom prays to Agni and Gandharva to cede the bride to him, and afterwards declares that Agni has given up his right. These expressions are explained by the commentator Gobhilaputra as allegorical. The girl is said to fall into the power of Soma when *inguen pube contegitur*, into the power of Gandharva when her breasts begin to swell, and into that of Agni when she first has her catamenia.

This proves that the marriage of girls before puberty has not the sanction of Vedic antiquity. As to the male sex, the late Boden Professor (H. H. Wilson) pointed out³ that, according to the Vedas, it was impossible for a man to marry before maturity, as nine years are specified as the shortest term of his studentship,

¹ Madras Journal of Literature and Science, 1864, p. 139.

² 'Soma obtained thee first: Gandharva as second obtained thee: Agni was thy third husband: thy fourth was man-born. Soma gave her to

Gandharva, Gandharva gave her to Agni. Then Agni gave me this (woman), together with wealth and sons.' Rv. 9.11. 40, 41.

³ Essays, II. 58, 59. See too Max Müller, Hibbert Lectures, 1882, p. 353.

until the expiration of which he was not allowed to marry. He did not enter his studentship till he was seven or eight, and therefore, at the earliest, he could not have been married before seventeen—the age mentioned in the above section. Lastly, the *gāndharva-vivāha*, or love-match, which, though now obsolete¹, anciently gave the status of wife, can have arisen only when marriages of adults were universal or the rule.

PART IV. OFFENCES AGAINST INDIVIDUALS.

This Part deals with wrongful acts affecting primarily individuals (and therefore giving rise to remedial rights in private law), which are also so harmful to society as to be punished by the State as crimes. It comprises six chapters which deal with offences relating to the following objects:—the Human Body (Chap. XVI); Reputation (Chap. XXI); Freedom from Intimidation, Insult, and Annoyance (Chap. XXII); Possession and Ownership (Chap. XVII); Documents and Trade-marks (Chap. XVIII); certain Contracts of Service (Chap. XIX).

We first come to the wrongful acts which fall under the head *Violence to of violence to the person, in its various kinds and degrees of the person.* homicide, hurt, rape, assault, imprisonment. The first portion of Chapter XVI, 'Of Offences affecting the Human Body,' deals with offences affecting human life, and must be read in connection with the general exceptions which show when the causing of a human being's death is not an offence. Simple homicides are either accidental or justifiable. Accidental homicide is where death is *Accidental homicide.* caused by accident or misfortune and without any criminal intention or knowledge (sec. 80).

Justifiable homicide is—

(a) Where death is caused by a judicial act or in pursuance of *Justifiable a judicial sentence pronounced by some Court or Judge, or in the homicide.* exercise of a power given or supposed in good faith to be given by law (secs. 76–79).

(b) Where life is taken in the exercise of a power given to a person by law without any judicial act or order (secs. 96–106).

(c) Where a person in good faith believes himself bound by law to do an act which causes death.

(d) In certain cases for the purpose of avoiding or preventing further loss of life (sec. 81).

The Code defines culpable homicide as causing death, by doing *Culpable an act with the intention of causing death, or with the knowledge homicide.*

¹ 3 All. 743.

that the doer by such act is likely to cause death, and then declares that, *except* in certain cases therein after excepted, culpable homicide is murder, *if* the act by which the death is caused is done with a certain intention, or with certain knowledge and without any excuse—such as, for example, that it is done in good faith for the purpose of preventing or avoiding further loss of life. But there is no definition of simple homicide; and the difficulty of bearing in mind all the general and special exceptions is so great, and the difference between the definitions of culpable homicide and murder is so small¹, that the Courts often feel difficulty in drawing the line between murder, culpable homicide not amounting to murder, and simple homicide. The construction which is generally put on these sections will be found in the foot-notes to secs. 299 and 300; but it is far too refined for unprofessional judges.

¹ The following tabular form showing the relation of the two crimes is taken, with one or two verbal corrections, from Sir James Stephen's *History of the Criminal Law*, III. 313:—

Subject to the exceptions in Chap. IV, culpable homicide is causing death by doing an act with any of the intentions undermentioned:—

1. An intention to cause death.
2. An intention to cause bodily injury likely to cause death.

3. Knowledge that he is likely by such act to cause death.

Culpable homicide is murder if the act by which death is caused is done with any of the intentions undermentioned:—

- 1'. An intention to cause death.
- 2'. An intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.
- 3'. An intention to cause bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.
- 4'. If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death by such injury.

'Here,' says Sir James Stephen, 'cases 1 and 1' are identical. Case 2 appears to me exactly equivalent to cases 2' and 3' taken together, for the element of knowledge which is included in 2' and absent from 2 is also absent from 3', so that 2' and 3' together are equal to 2. Case 3 and case 4' differ only in the circumstance that 4' is more explicit. [This is hardly right, as 4' brings in the element of

'imminent danger.'] Murder under 4' requires the absence of any excuse for running the risk, but homicide could hardly be intended to be culpable if such an excuse was present, especially as the general exception in sec. 81 appears to meet the case exactly.' Dr. Markby (*Elements of Law*, 3rd ed., 118, note) points out the ambiguity of the term 'knows' in 2' and 4'.

The definitions just referred to are the weakest part of the Code, and the law on the subject should be re-cast so as to express clearly what is or ought to be the intention of the legislature. It seems to me that the Code should declare, first, that whoever causes the death of a human being, in the cases mentioned in secs. 76-81, 87, 88, 89, 92, and in the third explanation to sec. 299, commits simple homicide; that he commits negligent homicide in the case mentioned in sec. 304 A; that he commits culpable homicide in the cases mentioned in sec. 300; that he commits culpable homicide not amounting to murder in the cases mentioned in secs. 299, expl. 3, and sec. 300, exceptions 1-5, and that he commits murder when he causes death in any other case. The following outline-clauses are submitted with sincere deference. It will be seen that they rest on this assumption, that it is impossible to suggest any case of homicide, other than the six cases specified in clause 1, which is not either culpable homicide or murder, and that it is impossible to suggest any case of culpable homicide, other than the five cases specified in clause 4, which is not murder.

1. Whoever causes death in any of the following cases commits simple homicide:—

(a) Where the death is caused accidentally and without any rashness or negligence or any criminal intention or knowledge in the doing of an act, whether lawful or unlawful¹. Sec. 80.
Sec. 299,
ill. (c).

(b) Where the death is caused justifiably, that is to say, (1) by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law: Sec. 77.

(2) by a person acting in execution of the sentence of a Court and believing, in good faith, that the Court had jurisdiction to pass such sentence: (3) by a person who is justified or bound by law or who, by reason of a mistake of fact, in good faith believes himself to be justified or bound by law, in causing the death: (4) by a person acting without any criminal intention to cause harm, and in good faith, for the purpose of preventing or avoiding other harm to person or property: (5) in exercising the right of private defence of cases or property, in the cases mentioned in secs. 100 and 103. Sec. 78.
Secs. 76,
79.

(c) Where the death is caused by such a child, person of unsound mind, or intoxicated person as is mentioned in secs. 82, 83, 84, 85. Sec. 81.

(d) Where the death is caused unintentionally by an act done in

¹ Here the Code differs from English law, according to which an offender who accidentally causes death while engaged in an unlawful act is

guilty of murder or manslaughter according as the act amounts, or does not amount, to a felony.

- Secs. 87-89.** good faith for the benefit of the person killed, when (1) he or (in the case of a person under twelve years of age or of unsound mind) his guardian has expressly or impliedly consented to such act, or (2) when it is impossible for the person killed to signify consent, or (3) when he is incapable of giving consent and has no guardian from whom it is possible to obtain consent in time for the act to be done with benefit.
- Sec. 90.** *Explanation.* The consent intended by this section does not include (1) a consent which the person doing the act knows, or has reason to believe, to have been given under and in consequence of fear of injury or mistake of fact, or (2) a consent given by a person who from unsoundness of mind or intoxication is unable to understand the nature and consequences of that to which he gives his consent, or (3) a consent given by a person who is under twelve years of age.
- Sec. 304 A.** 2. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide as hereinafter defined commits homicide by negligence.
- Sec. 299.** 3. Whoever by doing an act (1) with the intention of causing death or such bodily injury as is likely to cause death, or (2) with the knowledge that he is likely by such act to cause death, causes the death of a human being commits culpable homicide.
- Explanation.* A person causes death within the meaning of this section :—
- Sec. 32.** (a) When he omits any act which he is legally bound to do, and such omission results in, or accelerates, death.
- Sec. 299, expl. 2.** (b) When he causes bodily injury to another who is suffering from sickness, a wound or infirmity, and thereby accelerates the death of that other.
4. Culpable homicide not amounting to murder is committed in the following cases :—
- Sec. 300, exc. 1.** (a) Where the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
- Sec. 300, exc. 2.** (b) Where the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right, without premeditation and without any intention of doing more harm than is necessary for the purpose of the defence.
- Sec. 300, exc. 3.** (c) Where the offender, being or aiding a public servant, exceeds

the powers given to such public servant by law, and causes death by doing an act which the public servant in good faith believes to be lawful and necessary for the due discharge of his duty, and without ill-will to the person whose death is caused.

(d) Where the offender causes death in a sudden fight, in the heat of passion, upon a sudden quarrel, and without premeditation, Sec. 300, exc. 4. taking undue advantage, or acting in a cruel or unusual manner.

(e) Where the offender causes death to a person who, being above the age of eighteen years, suffers death, or takes the risk of death, Sec. 300, exc. 5. with his own consent.

Explanation. The provocation intended by this section does not include provocation (a) sought, or voluntarily provoked, by the offender as an excuse for killing or doing harm to any person, Sec. 300, exc. 1, proviso. (b) given by anything done in obedience to the law or by a public servant in the lawful exercise of his powers, (c) given by anything done in the lawful exercise of the right of private defence.

5. Whoever causes the death of a human being in any case not provided for by any of the last four preceding sections commits culpable homicide amounting to murder.

Sec. 304 A punishes the causing of death by negligence. The Code as framed excluded this crime. Such exclusion appeared to Sir James Stephen to involve neglect of a matter which ought to be taken into account in penal legislation—the effect which an offence produces on the feelings and imagination of mankind. He accordingly carried through the Council the Act¹ which added this section to the Code. ‘If two persons,’ he writes, ‘are guilty of the very same act of negligence, and if one of them causes thereby a railway accident, involving the death and mutilation of many persons, whereas the other does no injury to any one, it seems to me that it would be rather pedantic than rational to say that each had committed the same offence and should be subjected to the same punishment. In one sense each has committed an offence; but the one has had the bad luck to cause a horrible misfortune, and to attract public attention to it, and the other the good fortune to do no harm. Both certainly deserve punishment; but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm; and the effect in the way of preventing a repetition of the offence is much the same as if both were punished.’ The Causing death by negligence.

Secs. 307, 308, 309 deal with attempts to commit murder, culpable homicide, and suicide. They will be considered under the last division, Attempts.

¹ XXVII of 1870, sec. 12.

² Hist. Crim. Law, III. 311, 312.

Thuggee. Secs. 310, 311, which should be amalgamated, provide a severe punishment for being a thug, that is for habitually associating with others for the purpose of committing robbery or child-stealing by means of or accompanied by murder.

Abortion. The next division of this chapter treats of abortion, exposure of children, and concealment of births, crimes which, owing to the practice of infant-marriage, are of lamentable frequency in India.

The other offences against the human body with which this chapter deals fall under one or more of the following heads: Hurt, Wrongful Restraint, Assault, Kidnapping, Rape.

Hurt. Every one has a right not to be wounded or disabled, whether by deliberate assault or by negligence. The hurt called 'grievous' includes (section 320) not only hurts which are distinguished by a broad and obvious line from slight hurts, but also any hurt which endangers life, or which causes the sufferer to be during the space of twenty days, (a) in severe bodily pain, or (b) unable to follow his ordinary pursuits. The clause about the limit of twenty days was suggested by the French Penal Code, Art. 309: — '*Sera puni de la peine de la réclusion, tout individu qui, volontairement, aura fait des blessures ou porté des coups, s'il est résulté de ces actes de violences une maladie ou incapacité de travail personnel pendant plus de vingt jours*'.¹ This criterion may be employed not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, setting of traps, digging of pitfalls, the placing of ropes across a road. But in apportioning the punishment, the Indian, unlike the French, Code takes into consideration both the extent of the hurt and the intention of the offender. The voluntary infliction of simple bodily hurt is punished with rigorous or simple imprisonment which may extend to one year, or fine, or both; the voluntary infliction or grievous bodily hurt with imprisonment of either description for a term which may extend to ten years and must not be less than six months, to which, fine may be added. These are the ordinary punishments, but there are certain aggravating

¹ 'Réclusion' signifies imprisonment and hard labour for a term of not less than five, nor more than ten years. Sir James Stephen adverts on the artificial and arbitrary character of the twenty days' rule. A slight injury to an artist's forefinger, or to a surgeon's wrist,

might easily prevent him from following his usual pursuits for three weeks, and so amount to grievous hurt, while an injury which caused a man to be afflicted with *tic douloureux* for the rest of his life would not be considered grievous. Hist. C. L., III. 316.

and mitigating circumstances which make a considerable difference.

Where bodily hurt is voluntarily inflicted in an attempt to murder the person hurt, the offender is punishable with transportation for life, or with imprisonment for a term which may extend to life, and cannot be less than seven years. Where the murderous intention is made out, the severity of the hurt inflicted, though important as evidence, is not a circumstance which ought to be considered in apportioning the punishment.

Where bodily hurt is inflicted by way of torture, section 327 provides a very severe punishment. In England such a provision is unnecessary, but the execrable cruelties which are committed by robbers in India for the purpose of extorting property, or information relating to property, render it absolutely necessary.

Bodily hurt may be inflicted by means the use of which generally indicate great malignity. A blow with the fist may cause as much pain and produce as lasting injury as laceration with a knife or branding with a hot iron. But in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of society than he who has only used his fist. Many hurts which would not be designated as grievous ought yet, on account of the mode in which they are inflicted, to be punished more severely than many grievous hurts. Section 324 therefore provides that where bodily hurt is voluntarily caused, by means of any sharp instrument of fire, of any heated substance, of poison, or of any corrosive substance, the maximum of imprisonment may be increased, in case of grievous hurt, to ten years, in other cases to three years.

Where hurt, or grievous hurt, is voluntarily caused, the punishment is mitigated (secs. 334, 335). Hitherto we have been considering cases in which hurt has been caused voluntarily. But hurt may be caused involuntarily yet culpably. There may have been no design to cause hurt, no expectation that hurt would be caused, yet there may have been a want of due care not to cause hurt. For these cases of the involuntary, yet culpable infliction of bodily hurt, and also for the like case of causing risk of hurt, secs. 336, 337, and 338 provide.

Every one has a right to go where he pleases so long as he ^{Wrongful} does not interfere with the rights of others. The Code, therefore, ^{restraint.} deals with cases of wrongful restraint (the keeping a man out of a place where he wishes to be and has a right to be) and wrongful confinement (the keeping a man within limits out of which he

wishes to go and has a right to go). The corresponding branch of English law is called 'False Imprisonment.'

The offence of wrongful restraint when it does not amount to wrongful confinement is seldom a serious one, and is therefore visited with a light punishment. Wrongful confinement may also be a slight offence, but when attended by aggravating circumstances, it may be one of the most serious that can be committed. One of these circumstances is the duration of the confinement. Confinement for a quarter of an hour may sometimes be a mere frolic, which would deserve only a nominal punishment, which might indeed be so harmless as not to amount to an offence. See sec. 95. But wrongful confinement continued during many days is always a most serious offence. The Code, secs. 342, 343, 344, is so framed as to give the offender a strong motive for abridging the detention of his prisoner. Another aggravating circumstance is, persisting in wrongfully confining a person notwithstanding an order issued by competent authority for his liberation or production. The offence of wrongfully confining a person in secret is punishable with imprisonment for a term which may extend to two years in addition to any other punishment to which the offender may be liable for such wrongful confinement. Here the offence is aggravated by the offender's endeavour to deprive his prisoner and those interested in him, or bound to protect him, of the remedies given by the law.

Assault.

Every one has a right not to be touched, pushed or struck in a hostile manner, not to be even menaced by gestures. The sections relating to assault and criminal force (349-358) begin with definitions of force and criminal force, the latter including what English lawyers term 'battery.' It will however be remembered that 'criminal force' may be so slight as not to amount to an offence (see sec. 95), and it will be observed that criminal force does not include anything that the doer does by means of another person. An assault is something less than the use of criminal force, the force being cut short before the blow actually falls, and the ordinary punishment for it is slight (sec. 352). But severe punishments are provided for assaults committed in attempting murder, in attempting to commit murder, or any other grave offence against the person, when committed with the intention of dishonouring the sufferer (sec. 355), or when it is an outrage offered to female modesty (sec. 354).

Mere words, it is explained (sec. 351), do not amount to an assault; and such acts as a blow which is purely accidental, an injury received in playing at any lawful sport by consent, reasonable chastisement of a child of tender age by its parent, guardian,

schoolmaster or schoolmistress¹, a blow or other violence in self-defence, use of force by a public servant within the sphere of his duty, are by the chapter of General Exceptions (sec. 89) saved from being accounted offences.

The crime of kidnapping is dealt with by secs. 359-369. The Kidnap-punishment for kidnapping is peculiarly severe when it is committed with murderous intentions, as in the case of those Bengalis who were formerly carried off into the Jaintia country for purposes of human sacrifice. The carrying off a grown-up person by force from one place in British India to another, and the enslaving him within British India, are provided for under the heads of Restraint (sec. 349) and Confinement (sec. 340). Slavery is expressly dealt with also by secs. 370, 371, and by the Indian Act V of 1843. Under sec. 370 it would seem that a pauper is punishable who sells himself into slavery for a maintenance².

The provisions relating to rape require only two remarks: first, Rape, that the British legislature, at the suggestion of Sir James Stephen, has recently declared³ that rape is committed when a man has intercourse with a married woman under circumstances falling under the fourth description contained in sec. 375; and, secondly, that sexual intercourse by a man with his own wife is rape when she is under ten years of age. The early age at which Hindu children are married and are, in the eye of the law, wives, makes it necessary that they should be protected till they are of an age to reside with their husbands.

A man has a right, as against all the world, to his good name, Defamation, that is to say, he has a right that the respect, so far as it is well founded, which others feel for him shall not be diminished⁴. Chapter XXI deals with Defamation, and should come next after the Chapter (now XVI) on offences relating to personal safety and freedom. It rests on the theory that, on the one hand, a man's reputation is to be protected by law as much as his person and property, and that, on the other, there are occasions on which it is necessary for the public good that the character of particular measures and persons should be the subject of unrestrained discussion. It does not recognise the English doctrine that libel is an offence because it tends to breaches of the peace; and it makes

¹ The Code does not recognise any similar right with reference to women.

² Compare Leviticus xxv. 25, 39, and Deuteronomy xv. 12, 13.

³ 48 & 49 Vic. c. 69, s. 4, last para.

⁴ Holland, 'Jurisprudence,' 151,

where the learned author points out two limitations to which the right is subject: 1, certain trivial imputations which do not infringe it, and, 2, certain circumstances under which an imputation, otherwise wrongful, would be justifiable.

no distinction between cases in which the words are spoken and those in which they are written, or printed. In England, as is well known, spoken words reflecting on private character, however atrocious may be the imputations which those words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action.

‘The essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed.

‘According to the theory of the criminal law of England, the essence of the crime of private libel consists in its tendency to provoke breach of the peace; and, though this doctrine has not, in practice, been followed out to all the startling consequences to which it would legitimately lead, it has not failed to produce considerable inconvenience.

‘It appears to us evident that between the offence of defaming, and the offence of provoking to a breach of the peace, there is a distinction as broad as that which separates theft and murder. Defamatory imputations of the worst kind may have no tendency to cause acts of violence. Words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the defamation considered as defamation is by no means proportioned to its tendency to cause such acts: nay, circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence, considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer, contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace.’

The infringement punishable under secs. 499, 500 may consist not only in words, spoken, written, or printed, but also in gestures or pictures (‘signs or visible representations’). It may be direct or indirect, i.e. it may disparage a man or his deceased near relative. It must be made so as to come to the

knowledge of persons other than the offender and the person defamed.

Sec. 499 is so drawn as to preclude the judge from deciding the question whether an imputation be or be not defamatory by reference to any single standard however correct of honour, of morality, or of taste. But it requires him to extend an impartial protection to opinions which he regards as erroneous, and to feelings with which he has no sympathy. The Indian races differ widely from each other in manners, tastes, and religious opinions. Practices which are regarded as innocent by one large portion of society excite the horror of another large portion. A Hindu would be driven to despair if he knew that he was believed by persons of his own religion to have eaten beef. A Mussulman would feel equally miserable if he were supposed by his co-religionists to have eaten pork. Where such diversities of opinion exist, the law, intended to prevent pain arising from opinion, ought to be sufficiently flexible to suit those diversities.

It must, however, be admitted that sec. 499 would, if strictly applied to English and (probably) Native scandalmongers, lead to alarming consequences.

There are ten excepted cases in which the Code tolerates imputations prejudicial to character. Under the first exception, the truth of such an imputation exempts its author from punishment as a defamer where it is for the public good that the imputation should be made or published. The Code does not define 'published,' and contains no illustrations of this exception. The following are taken from the framers' notes to the Draft Penal Code:—

'A person who has been guilty of gross acts of swindling, at the Cape, comes to Calcutta, and proposes to set up a house of agency. A person who has been forced to fly from England, on account of his infamous vices, repairs to India, opens a school, and exerts himself to obtain pupils. A captain of a ship induces natives to emigrate, by promising to convey them to a country where they will have large wages, and little work: he takes them to a foreign colony where they are treated like slaves, and returns to India to hold out similar temptations to others. A man introduces a common prostitute, as his wife, into the society of all the most respectable ladies of the Presidency. A person in a high station is in the habit of encouraging ruinous play among young servants of the Company. In these cases a writer who publishes the truth renders a great service to the public, and cannot, without a violation of every sound principle, be treated as a criminal.

'But the proclaiming to the world that a man keeps a mistress,

that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person, the raking up of ridiculous and degrading stories about the youthful indiscretions of a man who has long lived irreproachably as a husband and a father, and who has attained some post which requires gravity, and even sanctity of character, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked, and to those who are connected with him.

Second exception.

The next exception allows the public conduct of public servants to be discussed, provided that such discussion be conducted in good faith, that is, with due care and attention to the matter in hand. It is obvious that the advantages arising from such discussion far more than compensate for the pain which it occasionally gives.

Third exception.

But there are public men who are not public functionaries. Persons who hold no offices may yet take an active part in urging or opposing the adoption of measures in which the community is interested. Every person ought to be allowed to comment, in good faith, on the proceedings of these volunteer servants of the public with the same freedom with which he is allowed to comment on the proceedings of its official servants. This is provided for by the third exception.

Fourth and fifth exceptions.

The fourth and fifth exceptions allow all persons to report the proceedings of a Court of justice, and to discuss, in good faith, the proceedings of such Courts and the conduct of parties, agents, and witnesses, as connected with those proceedings. It is generally acknowledged that the Courts of law ought to be thrown open to the public¹; but the advantage of throwing them open would be small indeed, if the few who are able to press their way into a Court were forbidden to report what had passed there, to the vast numbers who were absent, or if those who are allowed to know what has passed are not allowed to comment thereon. The only reason that the whole community is not admitted to hear every trial that takes place, is that it is physically impossible that they should find room; and by the fourth and fifth exceptions, the Code does its best to counteract the effect of this impossibility. When the Code is revised these two exceptions should be extended to the four legislative councils established in British India².

Sixth exception.

The sixth exception allows every person to criticise, in good faith, published books, works of art which are publicly exhibited, and other similar performances.

Seventh exception.

The seventh exception allows a person under whose authority

¹ But see the Indian Divorce Act, IV of 1869, sec. 53.

² See *Wason v. Walter*, L. R. 4 Q. B. 73.

others have been placed either by their own consent or by the law to censure in good faith those who are so placed under his authority as far as regards matters to which that authority relates.

The eighth exception allows a person to prefer an accusation against another, in good faith, to any person who has lawful authority to restrain or punish the accused with respect to the matter of the accusation. Eighth exception.

The ninth exception excepts from the definition of defamation imputations on character which a person makes, in good faith, for the protection of the interest of himself or some other person, or for the public good. It thus covers the same ground as the first exception. The tenth exception seems intended to privilege statements made in discharge of a moral or social duty to give information in the matter to the person cautioned. Ninth exception.
Tenth exception.

It will be observed that Exceptions 2, 3, 5, 6, 7, 8, 9 and 10, do not require that an imputation should be true¹. The Code requires only that it should be made in good faith, that is, with due care and attention. For to require in these cases that the imputation should be true, would be to render these exceptions mere nullities.

‘Whether a public functionary is or not fit for his situation ;—whether a person who has bestirred himself to get up a petition in favour of a public measure ought to be considered as an enlightened and public-spirited citizen or as a foolish meddler ;—whether a person who has been tried for an offence was, or was not guilty ;—which of two witnesses who contradicted each other on a trial ought to be believed ;—whether a portrait is like ;—whether a song has been well sung ; whether a book is well written ;—these are questions about which honest and discerning men may hold opinions diametrically opposite : and to require a man to prove to the satisfaction of a court of law that the opinion which he has expressed on such a question is a right opinion, is to prohibit all discussion on such questions. The same may be said of those private communications which the Code allows. It is plainly desirable that a merchant should disclose to his partners his unfavourable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a court, it is evident that the permission is worth nothing.

¹ Truth is a justification in two cases only, 1, when the publication is for the public good (exc. 1) ; and,

2, when it is a report of proceedings in court (exc. 4).

'Whether an imputation be or not made in good faith is a question for the courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case could arise respecting which a sensible and impartial judge would feel any doubt. If, for example, a public functionary were to prosecute for defamation a writer who had described him in general terms as incapable, the court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the court would probably be of opinion that the defendant had not written in good faith, and would convict him.

'On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the court would probably hold that the burden of proving good faith lay on the defendant. Thus if a person were to publish that a collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the courts would probably be of opinion that the imputation had not been made in good faith.'

Printing
and selling
defamatory
matter.

Sec. 501 deals with the offence of printing or engraving matter known to be defamatory, and sec. 502 with the offence of selling such prints and engravings.

Imputations which are not defamatory may be punishable on other grounds.

An imputation may be intended to excite disaffection, if so, though not punishable as defamation, it will be punishable under section 124 A. An imputation which is not defamatory may be intended to excite a mob to violence against an individual. If so, the author of the imputation is punishable under section 117.

Chapter XXII deals with criminal intimidation, insult, and the annoying conduct of a drunken person.

Criminal
intimidation.

Criminal intimidation is committed when one man threatens another with any harm illegally caused to his person, reputation, or property, with intent to cause alarm to him, or to cause him to do any act which he is not legally bound to do, as the means of avoiding the execution of such threat. This offence was till lately

not punishable in England. But now see the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vic. c. 87), s. 7.

Another kind of criminal intimidation is made punishable by *Sitting dharma*. sec. 508. This declares that if *A* voluntarily causes *B* to do anything which *B* is not legally bound to do, by inducing *B* to believe that he will, by some act of *A*, be rendered an object of Divine displeasure if *B* does not do the thing which it is *A*'s object to cause him to do, shall be punished with imprisonment for not more than one year, with or without fine. This is directed against the Brahmanic practice called in Sanskrit *ācharita* or *prayopaveśana* and in Hindi *dharna*¹.

Insults are provided for by secs. 504 and 509, which should be *Insult*. placed together. They are punishable only when offered with the intention of provoking a breach of the peace or of outraging the modesty of a woman. Section 509 might be used to abate the practice technically called 'obstructing a door,' which prevails in Bihār and probably elsewhere in India. When a landlord wishes to compel a tenant to perform any work, which the latter refuses to do, he sends a male servant to 'obstruct' the tenant's door. The servant simply sits on the road and leers lecherously at any women who issue from the house. The result is that the tenant is practically besieged into compliance, for his women dare not leave the house either to fetch water from the well or, in the morning, for the necessary ablutions².

The only section relating to annoyance is 510, which imposes a slight penalty on any drunken person who conducts himself in any public place, or in any place where he has no right to be, so as to cause annoyance to any other person. *Annoyance by drunken person.*

This chapter also contains a section (as to knowingly circulating false rumours), which is here wholly out of place. As the Code is now arranged, this enactment (305) should be split into three sections, of which one should be inserted in Chapter VI, one in Chapter VII, and one in Chapter VIII. *False rumours.*

Chapter XVII is entitled 'Of Offences against Property.' The offences defined in this chapter are made punishable on the ground that they are violations of rights of possession or ownership. But these rights are themselves the creatures of the law. It is evident,

¹ This practice appears to be one of Indo-European antiquity, and has been identified with the 'fasting' (*troscud*) of the Irish Brehon laws. See Maine, 'Early History of Institutions,' pp. 297, 298; and Holland,

'Jurisprudence,' p. 262, where 'debtor' should be 'creditor' and 'creditor' should be 'debtor.'

² Grierson, 'Zeitschrift der morgenl. gesellschaft,' xxxix. 656, note 10.

therefore, that if the substantive civil law touching these rights be imperfect or obscure, the penal law which is auxiliary to that substantive law, and of which the object is to add a sanction to that substantive law, must partake of the imperfection or obscurity. 'It is impossible,' said the framers of the Code, 'for us to be certain that we have made proper penal provisions for violations of civil rights till we have a complete knowledge of all civil rights; and this we cannot have while the law respecting those rights is either obscure or unsettled. As the present state of the civil law causes perplexity to the legislator in framing the penal code, so it will occasionally cause perplexity to the judges in administering that code. If it be matter of doubt what things are the subjects of a certain right, in whom that right resides, and to what that right extends, it must also be matter of doubt whether that right has or has not been violated.

'For example, *A*, without *Z*'s permission, shoots snipes on *Z*'s ground, and carries them away: here, if the law of civil rights grants the property in such birds to any person who can catch them, *A* has not, by killing them and carrying them away, invaded *Z*'s right of property. If, on the other hand, the law of civil right declares such birds the property of the person on whose lands they are, *A* has invaded *Z*'s right of property. If it be matter of doubt what the state of the civil law on the subject actually is, it must also be matter of doubt whether *A* has wronged *Z*, or not.'

The violations of the rights of Possession and Ownership made punishable by this chapter fall under one or more of the following heads:—1. Theft; 2. Criminal Misappropriation of Property not in possession; 3. Criminal Breach of Trust; 4. Extortion; 5. Robbery; 6. Receiving stolen Property; 7. Cheating; 8. Fraudulent Insolvency; 9. Mischief; 10. Criminal Trespass.

All these offences resemble each other in this, that they cause, or have some tendency directly or indirectly to cause, some person not to have such a dominion over property as he is entitled by law to have. But the offences numbered 1-8 must be in all cases fraudulently committed, whereas fraud does not enter into the definition of mischief, or of criminal trespass.

Theft.

Theft, criminal misappropriation of property not in possession, and criminal breach of trust are in a great majority of cases easily distinguishable. But the distinction becomes fainter and fainter as we approach the line of demarcation, and at length the offences fade imperceptibly into each other. This indistinctness has its origin in the nature of things, and in the imperfection of language.

The framers of the Penal Code believed it to be impossible to

mark with precision by any words the circumstances which constitute possession.

'It is easy,' they say, 'to put cases about which no doubt what-
ever exists, and about which the language of lawyers and of the multitude would be the same. It will hardly be doubted, for example, that a gentleman's watch lying on a table in his room is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table, or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey, and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner his silver forks, while in the hands of his guests, are still in his possession¹; and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawnbroker as a pledge². But between these extreme cases lie many cases in which it is difficult to pronounce, with confidence, either that property is, or that it is not in a person's possession.'

For the purpose of preventing any difference of opinion from arising in cases likely to occur very often, the framers of the Code laid down three rules (clause 17, now sec. 27, and clauses 18 and 19, omitted, I know not why, from the Code as passed), which they believed to be in accordance with the general sense of mankind as to what shall be held to constitute possession. But, in general, the Code leaves it to the tribunals, without any direction, to determine whether particular property is at a particular time in the 'possession' of a particular person, or not.

Where the Codes, the commentaries and the High Court Reports fail them, Indian judges and magistrates are supposed to resort to 'justice, equity, and good conscience;' but in practice they look for guidance only to English text-books. And as, according to Sir James Stephen, the whole [English] doctrine of possession is so arbitrary and unreal that it is hard to say that one view is better or worse than another³, the following rules may be useful. They

¹ See 1 Hale, P. C. 506.

² So in Roman Law: see Savigny, *Recht des Besitzes*, 1837, § 24.

³ A Digest of the Criminal Law, 3rd ed., p. 213, note. He is referring to the decision in *Reg. v. Masters*, 1 Den. C. C. 332, which he states thus: 'A, B and C are all servants of D. D's customers pay money to C, who pays it to A, who pays it to B. B, A and C each keep separate ac-

counts of their receipts and payments, so as to be checks on each other. Money of D's paid by C to A is in A's possession and not merely in his custody.' But, assuming that the servants were obedient to D's orders, the money was in A's hands as D's representative, and therefore the possession was in D, for he could exercise physical control over the money and had the intention to exercise it on

are founded, as every jurist will see, on the famous treatise of Savigny. They agree with the practice of the High Courts at Calcutta and Madras in cases of theft. And they will apply not only to the sections on theft (378, 381), criminal misappropriation (sec. 404), and stolen property (410, 412), but to those relating to coin (235, 240-243, 250-254), stamps (256, 259), weights and measures (266), machinery (287), obscene books (293), criminal trespass (441), forgery (473, 474, 475), and property-marks (485). The expression 'corporeal property' is used instead of the more accurate 'corporeal thing,' as the former occurs in the Code, sec. 22.

Proposed
definition.

'Corporeal property is in a person's possession when he has such power over it that he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or of some person of whom he is guardian or for whom he is trustee¹.'

'Where a person under twelve years of age² or of unsound mind³ has a like power over corporeal property, his guardian, if any, is deemed to be in possession of the property. If such person has no guardian and the property has been delivered to him, he is deemed to be in possession of the property⁴.'

'Where corporeal property belongs to co-owners, and they have a like power over it, and intend to exercise, if necessary, that power on their own behalf, each of them is deemed to be in possession of his share of the property⁵.'

Where corporeal property belongs to a corporation, and the corporation has a like power over it, the agent or trustee of the corporation is deemed to be in possession of the property.

Explanation I. One person is deemed to have power over corporeal property in the custody⁶ of another when the latter

his own behalf. If, however, A on receiving the money determined to appropriate it, then the possession was in A.

¹ This intention (nearly the *animus domini* of Roman law, the intention not of being, but of acting as, owner) is of course inferrible from external circumstances. The clause in the text applies not only to the case of an owner but to that of a derivative possessor. As to the latter, illustration (e) to sec. 378 of the Penal Code shows that its framers dissented from the theory of Roman law that a bailee was not a possessor. They would also doubtless have held that a dis-

treinor, a tenant, and a fructuary had possession.

² Compare the Code, sec. 90.

³ Such persons cannot have the *animus domini*, nor can they assent to the acquisition of possession by a representative.

⁴ Here, according to Puchta, the *animus* of the child is awakened and completed by the expressed will of the *tradens*. As to possession in case of infants and lunatics, see Savigny, *Recht des Besitzes*, § 21, p. 297; Markby, 'Elements of Law,' 3rd ed., §§ 375, 376.

⁵ *Ibid.* § 399.

⁶ The Roman *detentio*.

is obedient to the orders of the former respecting that property¹.

Explanation II. The power and intention contemplated by this section continue until they are respectively destroyed by adverse power or contrary intention².

Explanation III. 'Guardian' includes any one having lawful charge of a person under twelve years of age or of unsound mind.

Explanation IV. 'Corporation' includes Her Majesty.

The provision contained in sec. 72 is meant to obviate the inconveniences which might arise from doubts as to the exact limits which separate theft from misappropriation, and from breach of trust. Object of sec. 72.

Its effect, say the Commissioners, 'will be to prevent the judges from wasting their time and ingenuity in devising nice distinctions. If a case which is plainly theft comes before them the offender will be punished as a thief. If a case which is plainly breach of trust comes before them, the offender will be punished as guilty of breach of trust. If they have to try a case which lies on the frontier, one of those thefts which are hardly distinguishable from breaches of trust, or one of those breaches of trust which are hardly distinguishable from theft, they will not trouble themselves with subtle distinctions, but, leaving it undetermined by which name the offence should be called, will proceed to determine what is infinitely of greater importance, what shall be the punishment.'

It is strange, then, that they did not simplify their law by rejecting (as Sir James Stephen suggests) the distinction between theft and criminal misappropriation, which turns upon the complicated idea of possession, and corresponds to no substantial difference either in the moral guilt or the public danger of the acts defined³.

The crime of Theft is composed of nearly the same ingredients as the 'larceny' of English lawyers. There are, however, five points of difference. First, the Code (sec. 378) makes everything which is moveable the object of theft. But there cannot be a larceny of matters which savour of the realty, such as minerals, trees, fixtures, title-deeds. Secondly, to obtain a conviction for 'theft,' if the dishonest intention, the absence of consent, and the moving are proved, the offence will be complete though the offender proposes to retain the thing moved for only a second. But in the case of Distinction between theft and larceny.

¹ A man therefore has possession of a thing in the custody of his wife, guest, servant or agent, provided he can take it from her or him at pleasure. This is called 'representative possession.'

² The power need not be in constant exercise, nor the intention in constant activity; Holland, 'Jurisprudence,' 3rd ed., pp. 165, 166.

³ Hist. Cr. Law, III. 318.

larceny, it is necessary to show an intention to deprive the owner of his property. Thirdly, to obtain a conviction for 'theft,' it is unnecessary to prove that the thief ever had the stolen thing in his power; but there cannot be a larceny, even if there has been an actual removal, if the offender has never had the thing in his power. For instance, where *A*, intending to take dishonestly a pencil out of the possession of a shopkeeper *Z*, without *Z*'s consent moves the pencil in order to such taking, he commits theft under the Code, even though he is unable to carry the pencil off on account of its being tied to *Z*'s counter. In such a case *Z* could not be convicted of larceny. Fourthly, there may be a 'theft' though the person from whom the thing is taken has no title thereto. But a larceny implies a taking from the possession of the rightful owner. Fifthly, there may be a larceny of anything, no matter how small its value may be; but under the Code nothing is an offence by reason that it causes harm so slight, that no person of ordinary sense and temper would complain of it.

Under the Indian as under the Roman law¹, a man may steal his own property if he takes it when in pawn or in possession of an usufructuary.

*Crimen
expilatae
haereditatis.*

Section 404 provides a penalty for the pillaging of property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person authorised to take charge of it. This crime, in the classification made by the framers of the Code, falls under the head, not of theft, but of misappropriation of property not in possession. Roman jurists viewed it in the same light. The property taken under such circumstances, they argued, being in no person's possession, could not be taken out of any person's possession. The taking therefore was not *furtum*, but belonged to a separate head called the *crimen expilatae haereditatis*².

Extortion
(sec. 383).

The offence of extortion is distinguished from the three offences we have been considering by this obvious circumstance, that it is committed by the wrongful obtaining of a consent. In one single class of cases theft and extortion are in practice confounded together

¹ 'Furtum est contractatio rei fraudulosa [lucri faciendi gratia] vel ipsius rei vel etiam usus possessionisve.' The words in brackets are of doubtful authority. They probably suggested the 'causing wrongful gain' of the definition of 'dishonestly' (sec.

24). But under the Indian Code there may be a theft, if there is intention to cause wrongful loss: it is unnecessary for there to be intention to cause wrongful gain.

² Dig. Lib. XLVII. Tit. 19.

so inextricably, that no judge however sagacious could discriminate between them. This class of cases therefore has, in all systems of jurisprudence with which we are acquainted, been treated as a perfectly distinct class; and this arrangement, though somewhat anomalous, is strongly recommended by convenience. The Code has therefore made robbery a separate crime.

There can be no case of robbery which does not fall within the definition either of theft, or of extortion. But in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft, or an extortion. A large proportion of robberies will be half theft, and half extortion. *A* seizes *Z*, threatens to murder him, unless he delivers all his property, and begins to pull off *Z*'s ornaments. *Z* in terror begs that *A* will take all he has, and spare his life, assists in taking off his ornaments, and delivers them to *A*. Here, such ornaments as *A* took without *Z*'s consent are taken by theft. Those which *Z* delivered up from fear of death are acquired by extortion. It is by no means improbable that *Z*'s right-arm bracelet may have been obtained by theft, and left-arm bracelet by extortion, that the rupees in *Z*'s girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this should be ascertained. For though in general the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought therefore to be made known to the courts, yet the consent which a person gives to the taking of his property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial.

The Code provides punishment of exemplary severity for the crime which was designated in the Regulations of Bengal and Madras by the name of *Dacoity*. This name is retained for the purpose of denoting, not only actual gang-robbery, but the attempting to rob when such an attempt is made or aided by a gang. The sections dealing with this crime are 391, 395-400, 402.

The law (secs. 410-414) relating to the offence of receiving stolen goods appears to require no comment.

The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is that the extortioner obtains the consent by intimidation, and the cheat by deception.

Robbery
(sec. 390).

Cheating
(sec. 415).

The Code makes it cheating to obtain property by deception in all cases where the property is fraudulently obtained, that is to say in all cases where the intention of the person who has by deceit obtained the property was to cause a distribution of property which the law pronounces to be a wrongful distribution, and in no other case whatever. However immoral a deception may be, it is not an offence against the rights of ownership, if its object is only to cause a distribution of property which the law recognises as rightful.

It will be seen that the definition of cheating includes many acts which are not punishable by the law of England, or of France. The Code punishes as guilty of cheating a man who, by false representations, obtains a loan of money, not meaning to repay it; a man who, by false representations, obtains an advance of money, not meaning to perform the service, or to deliver the article for which the advance is given; a man who, by falsely pretending to have performed work for which he was hired, obtains pay to which he is not entitled.

In all these cases there is deception. In all the deceiver's object is fraudulent. He intends in all these cases to acquire or retain wrongful possession of that to which some other person has a better claim, and which that other person is entitled to recover by law. In all these cases, therefore, the object has been wrongful gain, attended with wrongful loss. In all, therefore, there has, according to the definition, been cheating.

Fraudulent insolvency. The provisions on the subject of fraudulent insolvency are necessarily imperfect, and must remain so, until the whole of that important part of the law has undergone revision¹.

Mischief. The provisions on the subject of mischief (sec. 425) do not appear to require any explanation.

Trespass. The name of trespass is given to every usurpation, however slight, of dominion over property. Trespass, as such, is not an offence, except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then, it is visited with a light punishment, unless it be attended with aggravating circumstances.

These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed.

¹ For the Presidency Towns, the 51, 70, and, for the Mufassal, in the Civil Procedure Code, secs. 351, 359. 11 & 12 Vict. c. 21, secs. 9, 24, 50,

There is no sort of property which it is so desirable to guard against unlawful intrusion, as the habitations in which men reside, and the buildings in which they keep their goods. The offence of trespassing on these places is designated as house-trespass, and is treated as an aggravated form of criminal trespass.

House-trespass again may be aggravated by being committed in a surreptitious, or in a violent manner. The former aggravated form of house-trespass is designated as lurking house-trespass; the latter is designated as housebreaking. Again; house-trespass in every form may be aggravated by the time at which it is committed. Trespass of this sort has, for obvious reasons, always been considered as a more serious offence, when committed by night, than when committed by day. Thus we have four aggravated forms of that sort of criminal trespass which are designated as house-trespass, lurking house-trespass, housebreaking, lurking house-trespass by night, and housebreaking by night.

These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order to a murder. It may also often happen that a criminal trespass which is venial, as respects the mode, may be of the greatest enormity as respects the end; and that a criminal trespass committed in the most reprehensible mode, may be committed for an end of no great atrocity. Thus *A* may commit housebreaking by night, for the purpose of playing some idle trick on the inmates of a dwelling. *B* may commit simple criminal trespass by merely entering another's field for the purpose of murder, or gang-robbery. Here, *A* commits trespass in the worst way. *B* commits trespass with the worst object. The Code combines the aggravating circumstances in such a way that each may have its due effect in settling the punishment.

Chapter XVIII deals with forgery, the making of forged documents (secs. 463-469), the possession and uttering of forged documents (secs. 470, 471, 474), and the making preparations for their manufacture (secs. 472, 473). Sec. 475 treats as a substantive offence the commencement of the forgery of banknotes and other similar securities and the possession of the prepared material. Sec. 477 deals with the fraudulent destruction of wills, authorities to adopt, and valuable securities. The destruction of documents of less importance is left to be dealt with as mischief (sec. 426).

The remainder of this chapter deals with the offences of using false trademarks, counterfeiting trademarks, and knowingly selling goods marked with a counterfeit trademark. There are similar

provisions as to marks used for denoting that moveable property belongs to a particular person. Sec. 484 provides an enhanced punishment when a property-mark used by a custom-officer, or officer in the Salt or Opium departments, is counterfeited.

Criminal
breach of
contract.

Chapter XIX relates to the breaches of certain Contracts, which cause great social inconvenience and for which the civil remedy is valueless. On this the framers of the Code make the following remarks:—

‘We agree with the great body of jurists in thinking that, in general, a mere breach of contract ought not to be an offence, but only to be the subject of a civil action.

‘To this general rule there are, however, some exceptions. Some breaches of contract are very likely to cause evil such as no damages, or only very high damages, can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation.

‘In England it would be unnecessary to provide a punishment for a stage-coachman who should, however maliciously or dishonestly, drive on, leaving behind a passenger whom he is bound to carry. The evil inflicted is seldom very serious. The country is everywhere well inhabited. The roads are secure. The means of conveyance can easily be obtained, and damages sufficient to compensate for any inconvenience or expense which may have been suffered can easily be recovered from the coach-proprietors. But the mode of performing journeys and the state of society in this country are widely different. It is often necessary for travellers of the upper classes, even for English ladies, ignorant perhaps of the native languages, and with young children at their breasts, to perform journeys of many miles, over uninhabited wastes, and through jungles in which it is dangerous to linger for a moment, in palanquins borne by persons of the lowest class. If, as sometimes happens, those persons should, in a solitary place, set down the palanquin and run away, it is difficult to conceive a more distressing situation than that in which their employer would be left. None but very high damages would be any reparation for such a wrong. But the class of people by whom alone such a wrong is at all likely to be committed can pay no damages. The whole property of the delinquents would probably not cover the expense of prosecuting them civilly. It therefore appears to us that breaches of contract of this description may, with strict propriety, be treated as crimes.

‘The law which we have framed on this subject applies, it will be

perceived, only to cases in which the contract with the bearers is lawful. The traveller therefore who resorts to the highly culpable, though, we fear, too common practice of unlawfully compelling persons against their will to carry his palanquin or his baggage will not be protected by it. If they quit him, it is what they have a legal right to do, nor will they be punishable, whatever may be the consequence of their desertion.

‘Another species of contract which ought, we conceive, to be guarded by a penal sanction is that by which seamen are bound to their employers. The insubordination of seamen during a voyage often produces fatal consequences. Their desertion in port may cause evils, such as very large damages only could repair. But they are utterly unable to pay any damages for which it would be worth while to sue. If a ship in the Hooghly, at a critical time of the year, is compelled by the desertion of some of the crew to put off its voyage for a fortnight, it would be mere mockery to tell the owners that they may sue the runaways for damages in the supreme court.

‘We also think that persons who contract to take care of infants, of the sick, and of the helpless, lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair. They generally come from the lower ranks of life, and would be unable to pay anything. We therefore propose to add to this class of contracts the sanction of the penal law.

‘Here we are inclined to stop. We have indeed been urged to go further, and to punish as a criminal every menial servant who, before the expiration of the term for which he is hired, quits his employer. But it does not appear to us that, in the existing state of the market for that description of labour in India, good masters are in much danger of being voluntarily deserted by their menial servants, or that the loss or inconvenience occasioned by the sudden departure of a cook, a groom, a harkáru, or a khidmatgár, would often be of a very serious description. We are greatly apprehensive that by making these petty breaches of contracts offences, we should give, not protection to good masters, but means of oppression to bad ones.’

The desertion of seamen in port is now provided for by Act I of 1859, secs. 83-88; and Act XIII of 1859 provides for the punishment of fraudulent breach of contract on the part of artificers, workmen and labourers, who have received money in advance on

account of work which they have contracted to perform. This Act, which applied in the first instance only to the Presidency towns, has been extended, under sec. 5, to many other parts of British India. It does not apply to contracts for domestic or personal service¹, and much inconvenience has been felt in consequence. The Inland Emigration Act (I of 1882), secs. 170, 171, 175, provides penalties for absence from work and desertion by labourers in the tea-gardens in certain districts of Bengal and Assam.

The Code, as above remarked, does not provide a penalty for the non-fulfilment of contracts of delivery to Government in times of war or other public need.

PART V. PARTICIPATION.

When two or more persons combine for criminal purposes, we may have, 1. two or more persons merely agreeing to commit an offence (conspirators); 2. two or more principal offenders (accomplices), having a common intention of doing a criminal act and actually doing it; 3. one or more principals with one or more abettors, or what English lawyers call accessories before the fact; 4. one or more principals with one or more accessories after the fact. Each of these combinations may, of course, occur in the same transaction. Thus *A* and *B* may conspire to instigate *C*, *D*, *E*, *F* and *G* to commit a dacoity, and *H* may harbour the dacoits.

The provisions of the Code relating to conspirators, accomplices, abettors, and accessories are found in the following sections:—

As to conspirators, sec. 107, cl. 2, which declares that whoever ‘engages’ with another in a conspiracy to do a certain thing abets the doing of that thing ‘if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing;’ sec. 108, expl. 5, which declares that ‘it is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it;’ and sec. 121 A, which deals with conspiracy to wage, attempt to wage, or abet the waging of war against the Queen, and declares that, to constitute such conspiracy, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

As to accomplices, the Code contains the following provisions:—

Sec. 34, which declares that when a criminal act is done by several persons, in furtherance of the common intention of all,

¹ 3 Ben. A. Cr. J. 32.

each of such persons is liable for the act as if it were done by him alone.

Sec. 35, which declares that whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention is done by several persons, each of such persons who joins in the act, with such knowledge or intention, is liable as if the act were done by him alone with that knowledge or intention.

Sec. 37, which declares that when an offence under the Code is committed by means of several acts, whoever intentionally co-operates in the commission of that offence, by doing any one of those acts, either singly, or jointly with any other person, commits that offence.

Sec. 38, which declares that when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences, by means of that act.

Secs. 310, 311, which punish thugs, that is, persons who habitually associate with others for the purpose of committing robbery or child-stealing by means of, or accompanied with, murder.

Secs. 391, 395-400, which deal with robbery committed conjointly by five or more persons, sec. 401, which punishes persons associated for the purpose of habitual theft, sec. 402, which deals with assembling for purpose of committing dacoity, and sec. 460, which declares that all persons jointly concerned in housebreaking by night shall be punishable for death or grievous hurt caused or attempted by one of their number.

As to abettors (*socii*, *Gehülfe*), the provisions of the Code are found in—

Secs. 107-117 (abetment).

Secs. 118, 119, 120, 123 (concealing designs to commit offences).

Sec. 121, abetting the waging of war against the Queen.

Sec. 125, abetting the waging of war against Asiatic powers in alliance or at peace with the Queen.

Secs. 131-139, abetting military or naval offences.

Sec. 150, promoting or conniving at the hiring etc. of persons to join unlawful assemblies.

Sec. 164, which provides for abetment by a public servant of the offences defined in secs. 162, 163 (taking presents to influence public servants).

Sec. 236, abetting in British India the counterfeiting of coin out of British India.

Secs. 305, 306, abetting suicide.

Sec. 497, which declares that, in case of adultery, the wife is not punishable as an abettor.

The provisions as to what English lawyers call accessories after the fact (*fautores*) are contained in—

Secs. 136, 137, harbouring deserters.

Secs. 212, 216, harbouring persons convicted of or charged with offences under the Code.

Sec. 318, concealing the birth of a child by secret burying.

Sec. 368, concealing kidnapped or abducted persons.

Secs. 410-414, receiving or assisting in concealing or disposing of stolen property.

But the Code treats offences under these sections as *delicta sui generis*.

With the exception of the provisions as to abetment contained in secs. 107-117, none of these enactments seem to require further notice. The offence of abetment is a substantive offence. It is punishable no matter how petty the offence abetted may be. Its punishment, when the offender has been present at the commission of the principal offence, is the same as for that offence (sec. 114), and the trial of it is not in any way dependent on the conviction of the principal offender¹. So in England since the enactment of 11 & 12 Vic. c. 46, s. 1. The offence of abetment mainly depends on the guilty knowledge or intention of the abettor. The knowledge or intention of the person he employs to act for him will not affect or alter the abettor's guilt, although the acts of that person may have an important bearing in determining it. The measure of punishment which the Code awards to abettors depends on the effect of the abetment; a distinction being made between cases in which the abetment is successful, and those in which the effect intended is not accomplished. If the act abetted is done, the abettor is punished as if he had himself committed the offence. If the act abetted is not done, he is punished less severely, but regard is had to the result of his abetment; any hurt which may be caused being deemed an aggravation of his offence. But no distinction seems to be made, as regards the abettor's punishment, between cases in which the person abetted involuntarily fails, or is prevented from carrying his intentions into execution, and those in which he resists altogether the solicitations of the abettor. In other words, instigation is punishable whether it fails or not².

Again, the person abetted may be guilty of a criminal act, and his abettor may in no way be answerable for it, because the act

¹ 1 Bom. 18.

is punishable only under §§ 85, 110,

² Under the *Strafgesetzbuch*, instigation (*aufforderung*) which fails

111, 159, 160.

done goes beyond or is quite distinct from the act intended by the abettor: he must answer for any probable consequence of his abetment, notwithstanding that the act or result may not be precisely what he intended, but he is not further responsible. The question will be this, Is the act done, although not precisely the act intended to be done, yet substantially the same, or a probable result of that act? If so, the abettor must answer for it.

The sort of conduct which constitutes abetment is explained, but no rule is or could be laid down on the subject of the degree of incitement or the force of the persuasion used, which will suffice to make a person an abettor.

The provisions of this, as of all succeeding Chapters, must be read with the foregoing Chapters of General Explanations and General Exceptions. Construed with reference to the latter Chapter, it is clear that those who cannot commit offences cannot be abettors of offences: therefore infants, insane persons and others excepted from criminal liability cannot be abettors¹.

PART VI. ATTEMPT.

Attempt (*conatus*), like negligence, is an imperfect state of a Attempt. crime. In the former more is willed than happens; in the latter more happens than is willed. An attempt can only be conceived as intentional², and, under the German Code, it is exempt from punishment if the offender voluntarily desists from the intent before the commencement of the actual crime.

The provisions of the Indian Code as to attempt are found in—
Sec. 121, attempt to wage war against the Queen.

Sec. 124, attempt wrongfully to restrain the Governor-General and other high officials with intent to induce or compel them to exercise or refrain from exercising any of their lawful powers.

Sec. 125, attempt to wage war against the Government of any Asiatic power in alliance or at peace with the Queen.

Sec. 130, attempt to rescue State prisoners or prisoners of war.

Sec. 161, attempt by a public servant to obtain an illegal gratification.

Sec. 162, attempt to obtain a gratification in order by corrupt or illegal means to influence a public servant.

Sec. 163, attempt to obtain a gratification for exercising personal influence over a public servant.

¹ M. & M. pp. 83, 84.

² Drage, Criminal Code, 58.

Sec. 196, corrupt attempt to use as true evidence known to be false.

Secs. 198 and 200, corrupt attempt to use as true a certificate or declaration known to be false in a material point.

Sec. 213, attempt to obtain a gratification to screen an offender from punishment.

Secs. 239 and 240, attempt to induce a person to receive counterfeit coin.

Sec. 241, attempt to induce a person to receive as genuine counterfeit coin which, when the offender took it, he did not know to be counterfeit.

Secs. 385, 387 and 389, attempt to put a person in fear of injury or accusation in order to commit extortion.

Sec. 391, conjoint attempt of five or more persons to commit a robbery.

Sec. 460, attempt by one of many joint housebreakers by night to cause death or grievous hurt.

In each of the above cases the attempt is punishable with the full penalty annexed to the crime attempted.

Secs. 307, 308, attempts to commit murder and culpable homicide.

Secs. 393, 394 and 398, attempts to commit robbery.

Under each of these five sections the attempt is punishable with a penalty less than that annexed to the crime attempted.

Sec. 309, attempt to commit suicide. This is punishable with simple imprisonment for a year, fine or both.

Sec. 511 provides generally for attempts to commit most of the offences punishable by the Code, where no special provision is made for such punishment. It runs thus: 'Whoever attempts to commit an offence punishable . . . with transportation or imprisonment, . . . and in such attempt *does any act towards the commission of the offence*, shall, where no express provision is made . . . for the punishment of such attempt, be punished with transportation or imprisonment . . . for a term which may extend to *one half* of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.'

On this arise three questions to which the Code affords no answer:—

1. What is the nature of the act 'towards the commission of the offence'? May it be merely preparatory? May it be a threat?

2. The illustrations show that there may be an attempt though the object of the intended offence is absent. But can there be an attempt when the object is mistaken? If, for example, the *κακούργος*-

rarely *A* of the Code strikes a block or shoots at a shadow, supposing the block or shadow to be the body of his enemy *Z*, and intending to murder *Z*, is *A* guilty of an attempt to murder?

3. Can there be an attempt when the means employed are insufficient? And if so, is there any distinction between the case where the means are absolutely insufficient (as where *A* intending to murder *Z* by poison, by mistake puts sugar instead of arsenic into *Z*'s cup) and the case where they are relatively insufficient (as where *A*, intending to murder *Z* by poison, puts into *Z*'s cup some arsenic, but not enough to kill him)?

The answers I would give to these questions are embodied in the following Explanations, which might be added to sec. 511—the words ‘and in such attempt does any act towards the commission of the offence’ being omitted:—

Explanation I. In every attempt punishable by this Code there must be an outward visible act done towards the commission of a particular offence. The procuring or arranging the means or measures necessary for the commission of an offence is not an act done towards the commission of that offence.

Explanation II. There may be an attempt to commit an offence although the object of the intended offence be absent. There cannot be an attempt to commit an offence where such object is mistaken.

Explanation III. There may be an attempt to commit an offence though the means employed be relatively insufficient. There cannot be an attempt to commit an offence when such means are absolutely insufficient.

Explanation I rests on the doctrine that thoughts and intentions, unless expressed by will, are outside the province of criminal law. It is supported by the following Indian decisions:—

Incendiarism produced by a ball of rag containing burning charcoal occurs on several occasions in a certain village. *A* is found at night by the villagers carrying hidden in his *dhoti* a ball of rags in which is a piece of burning charcoal. This is not an attempt to commit mischief by fire. (3 Ben. Cr. 55, per Mitter, J.)

A, intending to forge a document in the name of *Z*, purchases a stamp-paper in *Z*'s name and causes the stamp-vendor to endorse *Z*'s name as purchaser. This is not an attempt to forge. (4 N. W. P. 46, and see 2 All. 106, 107; 3 Mad. 4.)

A prints and corrects a receipt-form intended, by additions which are to be made to it, to be a false document. This is not an attempt to commit forgery. *A* procures *Z* to make *A* a false key of a house where he intends to commit housebreaking. This is not an attempt to commit housebreaking. (7 Cal. 352, 357.)

A having a wife causes the publication of banns of marriage between himself and another woman. This is not an attempt to commit bigamy. (1 All. 316.)

So when *A* intending to shoot *Y* and poison *Z* borrows a gun and buys poison. These are not attempts to commit murder. (M. & M. 456.)

But when *A* digs a hole, intending to place salt therein, so that the discovery of the salt so placed may be used in evidence against *B* in a judicial proceeding, *A* is guilty of an attempt to fabricate false evidence. (4 N. W. P. 133.)

Explanation II rests on the authority of the illustrations to sec. 511 and of Bramwell B. in 1 D. & B. 201. Though the object be absent, still the act is commenced. But where the object is mistaken, nothing is done 'towards' or in the direction of the offence: there is, in other words, no commencement of the act.

The reasons for the two propositions in Explanation III are, 1, that though the means are relatively insufficient, still the act is commenced; but, 2, where they are absolutely insufficient, there is no such commencement.

Under the Indian Code there is no punishment for attempts to commit offences for which fine is the only punishment, i. e. offences under secs. 137, 154, 155, 156, 278, 283, 290, and 294 A.

The subject of Attempt may be left with the remark that the Indian Code does not exempt the offender from punishment even though he voluntarily desists from his intention before the commencement of the actual crime.

Prescription.

On the ground of public welfare, the Code, unlike other systems of criminal law, recognises no limit within which offences must be prosecuted. Certain special laws, however, prescribe periods of limitation for prosecutions for minor offences¹.

Strict construction.

Lastly, as the Code is a penal law, the Indian Courts, following English decisions, have laid down that it must be construed strictly². That, in other words, its language when ambiguous should be interpreted in the manner most 'favourable to the liberties of the subject,'—a sounding phrase which simply means 'so that it may embrace as few cases as possible;' and that this is more especially so when the penal enactment is of an exceptional character³. When the Code is revised, it would be

¹ See the Introduction to the Criminal Procedure Code in Vol. II. of this work.

² 7 Suth. P. C. 19, where the Judi-

cial Committee applied the rule to Ben. Reg. xi. of 1796.

³ See *Reg. v. Bhista*, 1 Bom. 308, 311.

well to insert a section resembling § 11 of the New York Penal Code: 'The rule that a penal statute is to be strictly construed does not apply to this Code, or to any of the provisions thereof; but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law.'

The Indian Penal Code was framed by Macaulay with the assistance of Mr., afterwards Sir J. M. Macleod. As in the case of the other Codes contained in this work, its basis is the law of England, stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise; but suggestions were derived from the French Code Pénal and from Livingston's Code of Louisiana. Something, too, seems to have been taken from Austin's *Province of Jurisprudence*, the first edition of which was published in 1832. Before becoming law the Indian Code was revised by Sir Barnes Peacock, assisted by Mr., afterwards Sir Walter Morgan. In spite of the forebodings of many of the Indian judges and advocates-general, it has been, in the words of Sir James Stephen, 'triumphantly successful.' Besides repressing the crimes common to all countries, it has abated, if not extirpated, the crimes peculiar to India, such as thuggee, professional sodomy, dedicating girls to a life of temple-harlotry, human sacrifices, exposing infants, burning widows, burying lepers alive, gang-robbery, torturing peasants and witnesses, sitting *dharna*. Translated into almost all the written languages of India, it has familiarised the Native mind with ideas of justice and humanity, the maintenance of public order and public morality, the rights of the individual to life, health, freedom, honour and property, the possibility of expressing a law with clearness and authority, and of dealing systematically with a vast and complicated subject. And from its lucid style and accurate wording the many Hindus and Muhammadans who study it in English find in it one of their most useful instruments of self-education. But, fortunately for critics and theologians, all known work, whether human or divine, has its defects. In the case of the Penal Code, some of the defects were unavoidable. 'Such is the relation which exists between the different parts of the Law, that no part can be brought to perfection while the other parts remain rude. The Penal Code cannot be clear and explicit while the substance of Civil Law and the Law of Procedure are dark and confused. While the rights of individuals and the powers of public functionaries are uncertain, it cannot always

be certain whether those rights have been attacked or those powers exceeded.' So Macaulay wrote in 1837. Since then the two Codes of Procedure have been passed, and, with the exception of actionable wrongs¹, every important branch of the substantive Civil Law has been codified in India. Since then, too, the elaborate and instructive Penal Codes for the State of New York and for the German Empire have been prepared and enacted; the art of constructing legislative measures has made much progress; and in particular the rules as to the arrangement of the subject-matter have been ascertained. Methodical arrangement is of practical importance as it aids the memory, facilitates reference, lessens the bulk of the law, and enables the student to comprehend the whole plan and future legislators to make amendments with greater ease². No one can say that the Indian Penal Code is as well arranged as it might be. Besides this, a large number of important, but sometimes conflicting, decisions on the construction of the Code have been delivered during the last twenty-four years, by the High Courts now established at Calcutta, Madras, Bombay, and Allahabad. Macaulay himself was of opinion that no point of law ought to continue to be a doubtful point more than three or four years after it has been mooted in a Court of justice. The time therefore has apparently come for repealing Act XLV of 1860, and for re-enacting it with the changes made by the Acts amending it, and with such further improvements in arrangement, wording, and substance as may commend themselves to the Government of India, after consulting the learned judges of the High Courts, and the ablest of the officers by whom the Code is administered in the Mufassal.

¹ A bill to codify this subject has been prepared for the Government of India by one of our

ablest draftsmen and most learned lawyers.

² Livingston's Works, i. 30.

CONTENTS.

CHAPTER	SECTION
I.—Introduction	1
II.—General Explanations	6
III.—Of Punishments	53
IV.—General Exceptions	76
V.—Of Abetment	107
VI.—Of Offences against the State	121
VII.—Of Offences relating to the Army and Navy	131
VIII.—Of Offences against the Public Tranquillity	141
IX.—Of Offences by or relating to Public Servants	161
X.—Of Contempts of the Lawful Authority of Public Servants	172
XI.—Of False Evidence and Offences against Public Justice	191
XII.—Of Offences relating to Coin and Government Stamps	230
XIII.—Of Offences relating to Weights and Measures	264
XIV.—Of Offences affecting the Public Health, Safety, Convenience, Decency, and Morals	268
XV.—Of Offences relating to Religion	295
XVI.—Of Offences affecting the Human Body	299
XVII.—Of Offences against Property	378
XVIII.—Of Offences relating to Documents and to Trade or Property-marks	463
XIX.—Of the Criminal Breach of Contracts of Service	490
XX.—Of Offences relating to Marriage	493
XXI.—Of Defamation	499
XXII.—Of Criminal Intimidation, Insult, and An- noyance	503
XXIII.—Of Attempts to commit Offences	511

ARRANGEMENT OF SECTIONS.

CHAPTER I.

INTRODUCTION.

	section
Preamble	
Title. Commencement. Local extent	1
Offences committed within British India	2
Offences committed beyond, but triable within, British India	3
Offences committed by servant of Queen within allied State	4
Saving of certain laws	5

CHAPTER II.

GENERAL EXPLANATIONS.

Definitions to be subject to exceptions	6
Expressions used in same sense throughout	7
Gender	8
Number	9
'Man'	10
'Woman'	id.
'Person'	11
'Public'	12
'Queen'	13
'Servant of the Queen'	14
'British India'	15
'Government of India'	16
'Government'	17
'Presidency'	18
'Judge'	19
'Court of Justice'	20
'Public servant'	21
'Moveable property'	22
'Wrongful gain'	23

	SECTION
'Wrongful loss'	23
'Wrongful retention'	ib.
'Being wrongfully kept out of property'	ib.
'Dishonestly'	24
'Fraudulently'	25
'Reason to believe'	26
Property in possession of wife, clerk or servant	27
'Counterfeit'	28
'Document'	29
'Valuable security'	30
'A will'	31
Acts include illegal omissions	32
'Act'	33
'Omission'	ib.
Act done by several in furtherance of common intention	34
When such an act is criminal by being done with criminal intention	35
Effect caused partly by act and partly by omission	36
Co-operation by doing one of several acts constituting an offence	37
Several persons committing criminal act may be guilty of different offences	38
'Voluntarily'	39
'Offence'	40
'Special law'	41
'Local law'	42
'Illegal'	43
'Legally bound to do'	ib.
'Injury'	44
'Life'	45
'Death'	46
'Animal'	47
'Vessel'	48
'Year'	49
'Month'	ib.
'Section'	50
'Oath'	51
'Good faith'	52

CHAPTER III.

OF PUNISHMENTS.

Punishments	53
Commutation of sentence of death	54
Commutation of sentence of transportation for life	55
Penal servitude	56
Fractions of terms of punishment	57
Offenders sentenced to transportation how dealt with until transported	58
When transportation may be substituted for imprisonment	59
When imprisonment may be wholly or partly rigorous or simple	60
Incapacity to acquire property	61

	SECTION
Forfeiture in case of heinous offenders	62
Amount of fine	63
Imprisonment in default of payment of fine	64
When offence punishable with imprisonment as well as fine	65
Description of imprisonment for such default	66
When offence punishable with fine only	67
Termination of such imprisonment	68
Termination upon payment of proportional part of fine	69
When fine may be levied	70
Punishment for offence made up of several offences	71
Where doubtful of which of several offences a person is guilty	72
Solitary confinement	73
Limit of solitary confinement	74
Second offence (punishable with three years' imprisonment) against coin, stamps or property	75

CHAPTER IV.

GENERAL EXCEPTIONS.

Act done by one bound, or by mistake of fact believing himself bound by law	76
Act of Judge acting judicially	77
Act done pursuant to judgment or order of Court	78
Act done by one justified, or by mistake of fact believing himself justified by law	79
Accident in doing lawful act	80
Act likely to cause harm, but done without criminal intent, and to prevent other harm	81
Act of child under 7 years of age	82
Act of child above 7 and under 12	83
Act of person of unsound mind	84
Involuntary intoxication	85
Offence requiring particular intent or knowledge committed during voluntary intoxication	86
Act not intended and not known to be likely to cause death or grievous hurt, done by consent	87
Act not intended to cause death, done by consent in good faith for the benefit of a person	88
Act done in good faith, for benefit of child or person of unsound mind, by or by consent of guardian	89
Consent known to be given under fear or misconception	90
Consent of person of unsound mind, intoxicated, or under 12	ib.
Acts which are offences independently of harm caused to person consenting	91
Act done in good faith for benefit of a person, without consent	92
Communication made in good faith	93
Compulsion	94
Act causing slight harm	95

ARRANGEMENT OF SECTIONS.

77

	SECTION
Private defence	96
Right of private defence of body and property	97
Right of private defence against act of person of unsound mind, &c.	98
Acts against which no right of private defence	99
Extent to which right may be exercised	100
When right of private defence of body extends to causing death	101
When such right extends to causing other harm	102
Commencement and continuance of such right	103
When right of private defence of property extends to causing death	104
When such right extends to causing other harm	105
Commencement and continuance of such right	106
Right of private defence against deadly assault when risk of harm to innocent person	106

CHAPTER V.

OF ABETMENT.

Abetment defined	107
Abettor	108
Abetment if act abetted is committed in consequence, and no express provision made for punishment	109
Abetment if person abetted acts with different intention from that of abettor	110
Liability of abettor when one act is abetted and different act done	111
Cumulative punishment for act abetted and for act done	112
Liability of abettor for effect caused by act abetted different from that intended	113
Abettor present when offence committed	114
Abetment of offence punishable with death or transportation for life	115
Abetment of offence punishable with imprisonment	116
Abetting commission of offence by public, or by more than ten persons	117
Concealing design to commit offence punishable with death or transportation for life	118
Public servant concealing design to commit offence which he should prevent	119
Concealing design to commit offence punishable with imprisonment	120

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

Waging, attempting to wage, or abetting waging of war against Queen	121
Conspiracy to commit offences punishable by section 121	121A
Preparing to wage war against Queen	122
Concealing design to wage war	123

	SECTION
Assaulting Governor-General, &c., with intent to compel or restrain exercise of lawful power	124
Exciting disaffection	124A
Waging war against allied Asiatic power	125
Committing depredation on territories of friendly power	126
Receiving property taken by war or depredation	127
Public servant voluntarily allowing prisoner of State or War to escape	128
Public servant negligently suffering such prisoner to escape	129
Aiding escape of, rescuing, or harbouring such prisoner	130

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

Abetting mutiny, or attempting to seduce soldier or sailor from duty	131
Abetting mutiny, if mutiny committed in consequence	132
Abetting assault by soldier or sailor on superior officer	133
Abetting such assault, if assault committed	134
Abetting desertion	135
Harbouring deserter	136
Deserter concealed on board merchant vessel	137
Abetting insubordination by soldier or sailor	138
Persons subject to Articles of War not punishable under this chapter	139
Wearing soldier's dress	140

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

Unlawful assembly defined	141
Joining unlawful assembly	142
Punishment	143
Being member of unlawful assembly armed with deadly weapon	144
Joining unlawful assembly after command to disperse	145
Force used by one member in prosecution of common object	146
Punishment for rioting	147
Rioting armed with deadly weapon	148
Offence committed in prosecution of common object	149
Hiring persons to join unlawful assembly	150
Joining assembly of five or more after command to disperse	151
Assaulting or obstructing public servant when suppressing riot, &c.	152
Giving provocation, with intent to cause riot	153
Liability of owner of land on which unlawful assembly is held	154
Liability of landowner for whose benefit riot is committed	155
Liability of his agent	156
Harbouring persons hired for unlawful assembly	157

ARRANGEMENT OF SECTIONS.

79

	SECTION
Being hired to take part in unlawful assembly or riot	158
Affray defined	159
Punishment for committing affray	160

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

Taking bribe in respect of official act	161
Taking gratification to influence public servant	162
Taking gratification for exercise of personal influence with public servant	163
Abetment by public servant of offences above defined	164
Public servant obtaining gift from person concerned in proceeding by such public servant	165
Public servant disobeying law, with intent to cause injury	166
Public servant framing incorrect document with intent to cause injury	167
Public servant unlawfully engaging in trade	168
Public servant unlawfully buying or bidding for property	169
Personating public servant	170
Wearing garb resembling one used by public servant	171

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

Absconding to avoid service of summons	172
Preventing service or publication of summons	173
Non-attendance in obedience to order from public servant	174
Omission to produce document to public servant	175
Omission to give notice or information to public servant	176
Furnishing false information	177
Refusing oath when duly required	178
Refusing to answer public servant	179
Refusing to sign statement	180
False statement on oath to public servant	181
False information, with intent to cause public servant to injure	182
Resistance to taking of property by lawful authority	183
Obstructing sale of property offered for sale by authority	184
Illegal purchase or bid for property offered for sale by authority	185
Obstructing public servant	186
Omission to assist public servant	187
Disobedience to order duly promulgated by public servant	188
Threat to public servant	189
Threat to induce abstention from applying to public servant	190

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

	SECTION
Giving false evidence	191
Fabricating false evidence	192
Punishment for false evidence	193
Giving or fabricating false evidence with intent to procure conviction of capital offence	194
Giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment	195
Using evidence known to be false	196
Issuing or signing false certificate	197
Using as true certificate known to be false in material point	198
False statement made in declaration by law receivable as evidence	199
Using as true any such declaration known to be false	200
Causing disappearance of evidence of offence committed, or giving false information touching it	201
Omitting to give information of offence by person bound to inform	202
Giving false information respecting offence committed	203
Destruction of document to prevent its production as evidence	204
False personation for purpose of proceeding in suit	205
Fraudulent removal or concealment of property to prevent its seizure	206
Fraudulent claim to property to prevent its seizure	207
Fraudulently suffering decree for sum not due	208
Dishonestly making false claim in Court	209
Fraudulently obtaining decree for sum not due	210
False charge of offence made with intent to injure	211
Harbouring offender	212
Taking gift &c. to screen offender from punishment	213
Offering gift or restoration of property in consideration of screening offender	214
Taking gift to help to recover stolen property, &c.	215
Harbouring offender who has escaped from custody, or whose apprehension has been ordered	216
Public servant disobeying law with intent to save person from punishment or property from forfeiture	217
Public servant framing incorrect record with intent to save person from punishment or property from forfeiture	218
Public servant in judicial proceeding corruptly making illegal order, &c.	219
Illegal commitment or confinement	220
Intentional omission to apprehend	221
Intentional omission to apprehend person under sentence or lawfully committed	222
Escape from custody negligently suffered by public servant	223
Resistance or obstruction to lawful apprehension	224
Resistance or obstruction to lawful apprehension of another	225
Omission to apprehend, &c. by public servant in cases not otherwise provided for	225A
Resistance to arrest, or escape in cases not otherwise provided for	225B
Unlawful return from transportation	226

	SECTION
Breach of condition of remission of punishment	227
Insult to public servant in judicial proceeding	228
Personation of juror or assessor	229

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

'Coin' defined	230
Queen's coin	ib.
Counterfeiting coin	231
Counterfeiting Queen's coin	232
Making or selling instrument for counterfeiting coin	233
Making or selling instrument for counterfeiting Queen's coin	234
Possessing instrument or material for purpose of counterfeiting coin	235
Abetting in India counterfeiting out of India of coin	236
Import or export of counterfeit coin	237
Import or export of counterfeits of Queen's coin	238
Delivery of coin, possessed with knowledge that it is counterfeit	239
Delivery of Queen's coin, possessed with knowledge that it is counterfeit	240
Delivery of coin as genuine which, when first possessed, deliverer did not know to be counterfeit	241
Possessing counterfeit coin by one who knew it to be counterfeit when he became possessed	242
Possessing Queen's coin by one who knew it to be counterfeit when he became possessed	243
Person employed in mint causing coin to be of illegal weight or composition	244
Unlawfully taking coining instrument from mint	245
Diminishing weight or altering composition of coin	246
Diminishing weight or altering composition of Queen's coin	247
Altering appearance of any coin with intent	248
Altering appearance of Queen's coin with intent	249
Delivery of coin possessed with knowledge that it is altered	250
Delivery of Queen's coin possessed with knowledge that it is altered	251
Possession of altered coin by one who knew it to be altered when he became possessed	252
Possession of Queen's coin by one who knew it to be altered when he became possessed	253
Delivery to another of coin as genuine which, when first possessed, deliverer did not know to be altered	254
Counterfeiting stamp	255
Possessing instrument or material for counterfeiting stamp	256
Making or selling instrument for purpose of counterfeiting stamp	257
Sale of counterfeit stamp	258
Possessing counterfeit stamp	259
Using as genuine stamp known to be counterfeit	260
Effacing writing from substance bearing stamp, or removing from document stamp used for it, with intent	261
Using stamp known to have been before used	262
Erasure of mark denoting that stamp has been used	263

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

	SECTION
Fraudulent use of false instrument for weighing	264
Fraudulent use of false weight or measure	265
Possessing false weights or measures	266
Making or selling false weights or measures	267

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CON-
VENIENCE, DECENCY, AND MORALS.

Public nuisance	268
Negligent act likely to spread infection of dangerous disease	269
Malignant act likely to spread infection of dangerous disease	270
Disobedience to quarantine rule	271
Adulteration of food or drink intended for sale	272
Sale of noxious food or drink	273
Adulteration of drugs	274
Sale of adulterated drugs	275
Sale of any drug as a different drug or preparation	276
Fouling water of public spring or reservoir	277
Making atmosphere noxious to health	278
Rash driving or riding on public way	279
Rash navigation	280
Exhibition of false light, mark or buoy	281
Conveying person by water for hire in overloaded or unsafe vessel	282
Danger or obstruction in public way or navigation	283
Negligent conduct as to poisonous substance	284
Negligent conduct as to fire or combustible matter	285
Negligent conduct as to explosive substance	286
Negligent conduct as to machinery	287
Negligence as to pulling down or repairing buildings	288
Negligence as to dangerous animal	289
Punishment for public nuisance	290
Continuance of nuisance after injunction to discontinue	291
Sale &c. of obscene books	292
Possession of obscene book for sale or exhibition	293
Obscene songs	294
Keeping lottery-office	294A

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

Injuring or defiling place of worship	295
Disturbing religious assembly	296
Trespassing on burial-places, &c.	297
Uttering words &c. to wound religious feelings	298

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

OFFENCES AFFECTING LIFE.

	SECTION
Culpable homicide	299
Murder	300
When culpable homicide is not murder	ib.
Culpable homicide by causing death of person other than person whose death was intended	301
Punishment for murder	302
Punishment for murder by a life-convict	303
Punishment for culpable homicide not amounting to murder	304
Causing death by negligence	304 A
Abetment of suicide of child, or insane person	305
Abetment of suicide	306
Attempt to murder	307
Attempts by life-convicts	ib.
Attempt to commit culpable homicide	308
Attempt to commit suicide	309
Thuggee	310
Punishment for thuggee	311

CAUSING MISCARRIAGE, INJURIES TO UNBORN CHILDREN, EXPOSURE OF INFANTS, AND CONCEALMENT OF BIRTHS.

Causing miscarriage	312
Causing miscarriage without woman's consent	313
Death caused by an act done with intent to cause miscarriage	314
Act done with intent to prevent child being born alive, or to cause it to die after birth	315
Causing death of quick unborn child by act amounting to culpable homicide	316
Exposure and abandonment of child under twelve years	317
Concealment of birth	318

HURT.

Hurt	319
Grievous hurt	320
Voluntarily causing hurt	321
Voluntarily causing grievous hurt	322
Punishment for voluntarily causing hurt	323
Voluntarily causing hurt by dangerous weapons or means	324
Punishment for voluntarily causing grievous hurt	325
Voluntarily causing grievous hurt by dangerous weapons or means	326
Voluntarily causing hurt to extort property or to constrain to illegal act	327
Causing hurt by means of poison, &c.	328
Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act	329

	SECTION
Voluntarily causing hurt to extort confession, or to compel restoration of property	330
Voluntarily causing grievous hurt to extort confession, or to compel restoration of property	331
Voluntarily causing hurt to deter public servant	332
Voluntarily causing grievous hurt to deter public servant	333
Voluntarily causing hurt on provocation	334
Causing grievous hurt on provocation	335
Punishment for act endangering life or personal safety of others	336
Causing hurt by act endangering life or personal safety of others	337
Causing grievous hurt by act endangering life or personal safety of others	338

WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

Wrongful restraint	339
Wrongful confinement	340
Punishment for wrongful restraint	341
Punishment for wrongful confinement	342
Wrongful confinement for three or more days	343
Wrongful confinement for ten or more days	344
Wrongful confinement of person for whose liberation writ has issued	345
Wrongful confinement in secret	346
Wrongful confinement for purpose of extorting property or constraining to illegal act	347
Wrongful confinement for purpose of extorting confession, or compelling restoration of property	348

CRIMINAL FORCE AND ASSAULT.

Force	349
Criminal force	350
Assault	351
Punishment for using criminal force otherwise than on grave provocation	352
Using criminal force to deter public servant	353
Assault or criminal force with intent to outrage woman's modesty	354
Assault or criminal force with intent to dishonour otherwise than on grave provocation	355
Assault or criminal force in attempt to commit theft of property carried by person	356
Assault or criminal force in attempt wrongfully to confine person	357
Assaulting or using criminal force on grave provocation	358

KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR.

Kidnapping	359
Kidnapping from British India	360
Kidnapping from lawful guardianship	361
Abduction	362
Punishment for kidnapping	363
Kidnapping or abducting in order to murder	364
Kidnapping or abducting with intent to confine	365
Kidnapping or abducting woman to compel marriage, &c.	366

ARRANGEMENT OF SECTIONS.

85

	SECTION
Kidnapping or abducting in order to subject person to grievous hurt, &c.	367
Wrongfully concealing or keeping in confinement kidnapped person	368
Kidnapping or abducting child under ten years with intent to steal	369
Buying or disposing of person as slave	370
Habitual dealing in slaves	371
Selling minor for purposes of prostitution, &c.	372
Buying minor for purposes of prostitution	373
Unlawful compulsory labour	374

RAPES.

Rape	375
Punishment for rape	376

UNNATURAL OFFENCES.

Unnatural offences	377
--------------------	-----

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

THEFT.

Theft	378
Punishment for theft	379
Theft in dwelling-house, &c.	380
Theft by clerk or servant of property in possession of master	381
Theft after preparation made for causing death or hurt	382

EXTORTION.

Extortion	383
Punishment for extortion	384
Putting person in fear of injury, in order to commit extortion	385
Extortion by putting person in fear of death or grievous hurt	386
Putting person in fear of death or of grievous hurt, in order to commit extortion	387
Extortion by threat of accusation of offence punishable with death or transportation, &c.	388
Putting person in fear of accusation of offence, in order to commit extortion	389

ROBBERY AND DACOITY.

Robbery	390
When theft is robbery	ib.
When extortion is robbery	ib.
Dacoity	391
Punishment for robbery	392
Attempt to commit robbery	393
Voluntarily causing hurt in committing robbery	394
Punishment for dacoity	395
Dacoity with murder	396

	SECTION
Robbery or dacoity, with attempt to cause death or grievous hurt	397
Attempt to commit robbery or dacoity when armed with deadly weapon	398
Making preparation to commit dacoity	399
Belonging to gang of dacoits	400
Belonging to wandering gang of thieves	401
Assembling for purpose of committing dacoity	402

CRIMINAL MISAPPROPRIATION.

Dishonest misappropriation of property	403
Dishonest misappropriation of property possessed by deceased at time of death	404

CRIMINAL BREACH OF TRUST.

Criminal breach of trust	405
Punishment for criminal breach of trust	406
Criminal breach of trust by carrier, &c.	407
Criminal breach of trust by clerk or servant	408
Criminal breach of trust by public servant, banker, merchant, or agent	409

RECEIVING STOLEN PROPERTY.

Stolen property	410
Dishonestly receiving stolen property	411
Dishonestly receiving property stolen in committing dacoity	412
Habitually dealing in stolen property	413
Assisting in concealment of stolen property	414

CHEATING.

Cheating	415
Cheating by personation	416
Punishment for cheating	417
Cheating with knowledge that wrongful loss may be thereby caused to one whose interest offender bound to protect	418
Punishment for cheating by personation	419
Cheating and dishonestly inducing delivery of property	420

FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY.

Removal or concealment of property to prevent distribution among creditors	421
Preventing from being made available for creditor's debt due to offender	422
Executing transfer-deed containing false statement of consideration	423
Dishonest or fraudulent removal or concealment of property	424

MISCHIEF.

Mischief	425
Punishment for committing mischief	426

	SECTION
Mischief causing damage to amount of Rs. 50	427
Killing or maiming animal worth Rs. 10	428
Killing or maiming animal worth Rs. 50	429
Injury to works of irrigation or wrongfully diverting water	430
Injury to public road, bridge or river	431
Causing inundation or obstruction to public drainage	432
Destroying light-house or sea-mark, or exhibiting false lights	433
Destroying &c. land-mark fixed by public authority	434
Mischief by fire or explosive with intent to cause damage to amount of Rs. 100	435
Mischief by fire or explosive with intent to destroy house, &c.	436
Mischief with intent to destroy or make unsafe vessel	437
Mischief described in sec. 437 when committed by fire or explosive	438
Intentionally running vessel aground with intent, &c.	439
Mischief after preparation made for causing death or hurt	440

CRIMINAL TRESPASS.

Criminal trespass	441
House-trespass	442
Lurking house-trespass	443
Lurking house-trespass by night	444
House-breaking	445
House-breaking by night	446
Punishment for criminal trespass	447
Punishment for house-trespass	448
House-trespass in order to commit capital offence	449
House-trespass in order to commit offence punishable with transportation for life	450
House-trespass in order to commit offence punishable with imprisonment	451
House-trespass after preparation made for causing hurt	452
Punishment for lurking house-trespass or house-breaking	453
Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment	454
Lurking house-trespass or house-breaking after preparation made for causing hurt	455
Punishment for lurking house-trespass or house-breaking by night	456
Lurking house-trespass or house-breaking by night, in order to commit offence punishable with imprisonment	457
Lurking house-trespass or house-breaking by night, after preparation made for causing hurt	458
Grievous hurt caused whilst committing lurking house-trespass or house-breaking	459
All persons jointly concerned in house-breaking by night punishable for death or grievous hurt caused by one of them	460
Dishonestly breaking open closed receptacle	461
Same offence when committed by person entrusted with custody	462

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR
PROPERTY-MARKS.

	SECTION
Forgery	463
Making false document	464
Punishment for forgery	465
Forgery of Court-record or public Register	466
Forgery of valuable security or will	467
Forgery for purpose of cheating	468
Forgery for purpose of harming reputation	469
'Forged document' defined	470
Using forged document as genuine	471
Making or possessing counterfeit seal, &c., with intent to forge valuable security or will	472
Making or possessing counterfeit seal, &c., with intent to forge other documents	473
Possession of valuable security or will known to be forged with intent to use it as genuine	474
Counterfeiting mark used for authenticating valuable security or will	475
Counterfeiting mark used for authenticating other documents	476
Fraudulent cancellation &c. of will	477

TRADE AND PROPERTY-MARKS.

Trade-mark	478
Property-mark	479
Using false trade-mark	480
Using false property-mark	481
Using false trade or property-mark with intent to deceive or injure	482
Counterfeiting trade or property-mark used by another, with intent, &c.	483
Counterfeiting property-mark used by public servant	484
Fraudulent making or possessing die for counterfeiting property or trade-mark	485
Knowingly selling goods marked with counterfeit property or trade-mark	486
Fraudulently making false mark upon package	487
Using such false mark	488
Defacing property-mark with intent to cause injury	489

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

Breach of contract of service during voyage or journey	490
Breach of contract to attend on and supply wants of helpless persons	491
Breach of contract to serve at distant place to which servant is conveyed at master's expense	492

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

	SECTION
Cohabitation caused by man deceitfully inducing belief of lawful marriage	493
Remarriage during life-time of husband or wife	494
Same offence with concealment of former marriage	495
Fraudulently going through marriage ceremony	496
Adultery	497
Enticing, taking away, or detaining with criminal intent married woman	498

CHAPTER XXI.

OF DEFAMATION.

Defamation	499
Imputation which public good requires to be made	<i>ib.</i> exc. 1
Public conduct of public servants	<i>ib.</i> exc. 2
Conduct touching public question	<i>ib.</i> exc. 3
Publication of reports of proceedings of Courts	<i>ib.</i> exc. 4
Merits of case decided in Court, or conduct of persons concerned	<i>ib.</i> exc. 5
Merits of public performance	<i>ib.</i> exc. 6
Censure passed in good faith by person having lawful authority over another	<i>ib.</i> exc. 7
Accusation preferred in good faith to duly authorised person	<i>ib.</i> exc. 8
Imputation made in good faith for protection of maker's interests	<i>ib.</i> exc. 9
Caution intended for good of person to whom it is conveyed or for public good	<i>ib.</i> exc. 10
Punishment for defamation	500
Printing or engraving matter known to be defamatory	501
Sale of printed or engraved substance containing defamatory matter	502

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

Criminal intimidation	503
Insult with intent to provoke breach of peace	504
Circulating false report	505
Punishment for criminal intimidation	506
Criminal intimidation by anonymous communication	507

	SECTION
Inducing one to believe that he will by offender's act become object of divine displeasure	508
Word or gesture intended to insult woman's modesty	509
Annoyance by drunken person	510

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

Punishment for attempting to commit offences punishable with trans- portation or imprisonment	511
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ACT No. XLV OF 1860.

PASSED BY THE LEGISLATIVE COUNCIL
OF INDIA.

(Received the assent of the Governor-General on the 6th October 1860).

THE INDIAN PENAL CODE

[As amended by Acts Nos. VI of 1861, XIV of 1870,
XXVII of 1870, XIX of 1872, X of 1873,
and VIII of 1882].

CHAPTER I.

INTRODUCTION.

WHEREAS it is expedient to provide a general Penal Code Preamble.
for British India; It is enacted as follows:

1. This Act shall be called THE INDIAN PENAL CODE, and Title.
shall take effect on and from the first day of January 1862¹ Commence-
throughout the whole of the territories² which are or may Local
become vested in Her Majesty by the statute 21 and 22 extent.
Victoria, chapter 106, entitled 'An Act for the better govern-
ment of India,' except the Settlement of Prince of Wales'
Island, Singapore and Malacca³.

¹ Act VI of 1861.

² As to offences committed on the high seas, but within three miles from the coast of British India, see 8 Bom. H. C., Cr. Ca. 63. As to offences on the high seas, beyond that limit, 7 Bom. H. C., Cr. Ca. 89; and

see above, pp. 5, 6.

³ This exception is practically repealed by Act V of 1867, which extends the Code to the Straits Settlement. As to the operation of the Code in places outside British India, see above, p. 3.

Offences
committed
within
British
India.

2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories on or after the said first day of January 1862¹.

Offences
committed
beyond,
but triable
within
British
India.

3. Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act² committed beyond the said territories, in the same manner as if such act had been committed within the said territories³.

Offences
committed
by servant
of Queen
within
allied
State.

4. Every servant of the Queen⁴ shall be subject to punishment under this Code for every act or omission contrary to the provisions thereof, of which he, whilst in such service, shall be guilty on or after the said first day of January 1862, within the dominions of any Prince or State in alliance with the Queen by virtue of any treaty or engagement heretofore entered into with the East India Company, or which may have been or may hereafter be made in the name of the Queen by any Government of India.

Saving of
certain
laws.

5. Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 & 4 William IV, Chapter 85⁵, or of any Act of Parliament passed after that Statute in any wise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of Officers and Soldiers in the service of Her Majesty, or of any special or local law⁶.

¹ The meaning is that for acts and omissions theretofore treated as criminal offences, every person should in future be liable to punishment under the Code and not otherwise, provided such act or omission be contrary to its provisions, 3 Mad. H. C. Rulings, xvi, xvii.

² Secs. 32, 33.

³ See 8 Bom. H. C., Cr. Ca. 92.

⁴ See sec. 14, below.

⁵ It is hard to see which of the unrepealed sections of this statute could in the absence of this saving have been affected by the Code. Possibly secs. 52, 73, 76, 80.

⁶ As to the effect of the last seven words see 3 Mad. H. C. Rulings, xvii, xxi. For lists of special and local laws, see above, pp. 7-10.

CHAPTER II.

GENERAL EXPLANATIONS.

6. Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter¹ entitled 'General Exceptions,' though those exceptions are not repeated in such definition, penal provision, or illustration.

Illustrations.

(a) The sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age².

(b) A, a police officer, without warrant, apprehends Z, who has committed murder: Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that 'nothing is an offence which is done by a person who is bound by law to do it'³.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation⁴.

8. The pronoun 'he' and its derivatives are used of any person, whether male or female.

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

10. The word 'man' denotes a male human being of any age: the word 'woman' denotes a female human being of any age.

¹ IV.

² Sec. 82.

not explained till sec. 350, is used in sec. 141 in conformity with that explanation.

³ Sec. 76.

⁴ Thus 'criminal force,' which is

Definitions
&c. subject
to excep-
tions.

Expressions
used in
same sense
through-
out.
Gender.

- 'Person.'** 11. The word 'person' includes any Company or Association or body of persons, whether incorporated or not¹.
- 'Public.'** 12. The word 'public' includes any class of the public or any community².
- 'Queen.'** 13. The word 'Queen' denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.
- 'Servant of the Queen.'** 14. The words 'servant of the Queen' denote all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 & 22 Victoria, Chapter 106, entitled 'An Act for the better government of India,' or by or under the authority of the Government of India³ or any Government⁴.
- 'British India.'** 15. The words 'British India' denote the territories which are or may become vested in Her Majesty by the said Statute 21 & 22 Victoria, Chapter 106, entitled 'An Act for the better government of India,' except the Settlement of Prince of Wales' Island, Singapore, and Malacca.
- 'Government of India.'** 16. The words 'Government of India' denote the Governor General of India in Council, or, during the absence of the Governor General of India from his Council, the President in Council, or the Governor General of India alone as regards the powers which may be lawfully exercised by them or him respectively.
- 'Government.'** 17. The word 'Government' denotes the person or persons authorised by law to administer executive Government in any part of British India.
- 'Presidency.'** 18. The word 'Presidency' denotes the territories subject to the Government of a Presidency.
- 'Judge.'** 19. The word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not

¹ Some words such as 'unless there is something repugnant in the subject or context' must be here supplied; for 'person' cannot have this meaning in secs. 56, 73, 84-87, 100, 105, 114, 137, 139, 141, 149-151, 153, 157, 159, 170, 192, 216, 220-225, 278, 282, 295,

297, 298, chap. xvi, secs. 490, 491, 497.

² This should be 'The words "the public" include' etc.: see secs. 117, 463, 477, 483, 484, 505.

³ Sec. 16.

⁴ Sec. 17.

appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(a) A Collector exercising jurisdiction in a suit under Act X of 1859¹, is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.

(c) A member of a panchayat which has power, under Regulation VII. 1816² of the Madras Code, to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

20. The words 'Court of Justice' denote a Judge who is 'Court of Justice' empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration.

A panchayat acting under Regulation VII. 1816² of the Madras Code, having power to try and determine suits, is a Court of Justice.

21. The words 'public servant' denote a person falling 'Public servant.' under any of the descriptions hereinafter following, namely—

First.—Every Covenanted servant of the Queen ;

Second.—Every Commissioned Officer in the Military or Naval Forces of the Queen while serving under the Government of India or any Government ;

Third.—Every Judge³ ;

Fourth.—Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document⁴, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties ;

¹ Repealed in the Lower Provinces, Ben. Act VIII of 1869, in the N.W. Provinces, Act XVIII of 1873.

² Repealed, Act III of 1873.

³ Sec. 19.

⁴ Sec. 29.

Fifth.—Every juryman¹, assessor, or member of a pancháyat assisting a Court of Justice or public servant ;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth.—Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property on behalf of Government², or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty ;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town or district³.

¹ 1 Suth. Cr. 36.

² Thus the náib názir of a collectorate is a public servant, 2 N.W.P. 298. But not the lessee of a village, though bound to keep accounts of its forest-revenues and give over a share of them to Government, 12 Bom. H. C. 4.

³ Indian legislatures have expressly included the following officers under the term 'public servant': Appraisers and bailiffs of Presidency Small Cause Courts (XV of 1882, s. 52); Coroners (IV of 1871, s. 5); Delegates of Páral Matrimonial Courts (XV of 1865, s. 23); certain Emigration officers

(XXI of 1883, ss. 16, 18; V of 1877, s. 50; Mad. Act V of 1866, s. 3); Forest officers (VII of 1878, s. 72; XIX of 1881, s. 71; Mad. Act V of 1882, s. 60); Indian Museum, servants and officers of (XXII of 1876, s. 14); Judges and Assessors of Courts of Survey and Ship-surveyors (VII of 1880, s. 50); Managers of encumbered estates (XXIV of 1870, s. 22; VI of 1876, s. 21; XIV of 1876, s. 32; XIV of 1877, s. 33; Reg. IV of 1872, s. 33); Municipal Commissioners and their servants (XV of 1873, s. 25; VII of 1874, s.

Illustration.

A Municipal Commissioner is a public servant¹.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words ‘public servant’ occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation².

22. The words ‘moveable property’ are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth³.

23. ‘Wrongful gain’ is gain by unlawful means of property to which the person gaining is not legally entitled⁴.

‘Wrongful loss’ is the loss by unlawful means of property to which the person losing it is legally entitled⁵.

22; Mad. Act I of 1874; Bom. Act III of 1872, s. 51; Bom. Act VI of 1873, s. 15; Officers &c. executing warrants of Marine Court (V of 1883, s. 14); Patwáris and Kánungos (XIX of 1873, s. 35); Pound-keepers (I of 1871, s. 6); Rangoon Port-commissioners, officers and servants (XV of 1879, s. 64); Registering officers (III of 1877, s. 84); Registrars of Muhammadan marriages (Ben. Act I of 1876, s. 25). Telegraph officers (XIII of 1885, s. 31) and railway servants (IV of 1879, s. 27) are also public servants, but only within the meaning of secs. 161–165 *infra*.

¹ But, *semble*, a municipal corporation, as distinct from its individual members, is not a public servant, 3 Cal. 760, 762.

² The following have been held *not* to be ‘public servants’:—

(a) A peon employed by the manager of an estate under charge of the Court of Wards, 7 Mad. 17.

(b) A labourer or menial servant employed to do work or labour on account of Government, 7 Mad. 18.

(c) A person appointed by the Government solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as prose-

cutor in the Calcutta Police Courts, 3 Cal. 497.

(d) A supernumerary peon of the Collector’s Court, who received no fixed pay from Government, but was remunerated by fees whenever employed to serve any process, 7 Ben. 446; S. C. 16 Suth. 27.

(e) An engineer who receives and pays to others municipal moneys, though he has not power to sanction their expenditure, 6 Bom. H. C., Cr. Ca. 64.

(f) A poddar of a bank which carries on the treasury-business of Government, 4 Cal. 376.

(g) A mauzadár, 8 Suth. Cr. 67.

(h) A convict warder, 7 Suth. Cr. 99.

³ This definition includes title-deeds, bonds, bills and notes.

⁴ The Code originally contained a chapter relating to gain by unlawful means of property to which the person gaining is *legally* entitled, as, for example, where A believing in good faith that Z owes him Rs. 100, in order to satisfy the debt takes property belonging to Z, not fraudulently, but under such circumstances that if he took it fraudulently he would be guilty of theft.

⁵ The deterioration of an article by use is not such a loss of property to

Wrongful retention. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

'Dishonestly.' 24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly' ¹.

'Fraudulently.' 25. A person is said to do a thing fraudulently if he does that thing with intent to defraud ², but not otherwise.

'Reason to believe.' 26. A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing, but not otherwise ³.

Property in possession of wife, clerk, or servant. 27. When property is in the possession of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of this Code ⁴.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

'Counterfeit.' 28. A person is said to 'counterfeit,' who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation.—It is not essential to counterfeiting that the imitation should be exact.

'Document.' 29. The word 'document' denotes any matter expressed or described upon any substance by means of letters, figures,

the owner, and the wrongful beneficial use of property is not such a gain to the wrongdoer, 3 Mad. H. C. Rulings, vi. Unlawfully seizing the bullocks of a widow in satisfaction of a debt due by her deceased husband is an example of 'wrongful loss,' 5 *Suth. Cr.* 68.

¹ 7 *All.* 404.

² i. e. to deprive another of a right by fraud. That 'fraud' means error caused by a mendacious statement,

express or implied, see *Markby*, §§ 691, 765; *Holland*, p. 193.

³ Thus a sane man has 'reason to believe' that omission to nourish his infant daughter must, in the ordinary course of nature, cause her death, 5 *N. W. P.* 47.

⁴ 'Property in the possession of a young child or of a lunatic, if such child or lunatic be in the keeping of a guardian, may be deemed to be in the possession of the guardian. . . .

or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter¹.

Explanation 1.—It is immaterial by what means, or upon what substance, the letters, figures, or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A check upon a banker is a document.

A power of attorney is a document.

A map or plan which is intended to be used, or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures, or marks, as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures, or marks within the meaning of this section, although the same may not be actually expressed.

Illustration.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words 'pay to the holder,' or words to that effect, had been written over the signature.

30. The words 'valuable security' denote a document which 'Valuable security.' is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right².

A man's goods are in his possession, not only while they are in his house or on his premises, but also when they are in a place where he may usually send them (as when horses and cattle feed on common land); or in a place where they may be lawfully deposited by him, as if he buries money or ornaments in his own land, or puts them in any other secret place of deposit,' *M. & M.* 334,

360. See more as to possession, *supra*, pp. 55, 56.

¹ A writing which is not legal evidence of the matter expressed may yet be a 'document' if the parties framing it believed it to be, and intended it to be, evidence of such matter, 2 Ben. App. Cr. 13.

² A settlement of accounts in writing in the handwriting of the prisoner, though not signed by any person

Illustration.

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a 'valuable security.'

'A will.' **31.** The words 'a will' denote any testamentary document¹.

Acts include illegal omissions. **32.** In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

'Act.' 'Omission.' **33.** The word 'act' denotes as well a series of acts as a single act: the word 'omission' denotes as well a series of omissions as a single omission.

Act done by several in furtherance of common intention. **34.** When a criminal act is done by several persons in furtherance of the common intention of all², each of such persons is liable for that act in the same manner as if it were done by him alone³.

When such act is criminal by being done with criminal intention. **35.** Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Effect caused partly by act and partly by omission. **36.** Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

Co-operation by **37.** When an offence is committed by means of several

comes within this definition (2 Mad. H. C. 257). But a *sanad* purporting to confer a certain dignity on the grantee has been held not to be a 'valuable security,' 10 Cal. 587. Nor is a mere copy of a lease, 4 Bom. H. C., Cr. Ca. 28.

¹ e. g. a codicil. The General

Clauses Act (I of 1868), which, however, does not apply to the Penal Code, includes in 'will' every writing making a voluntary posthumous disposition of property.

² Ben. Supp. Vol. p. 443 (S. C. 5 Suth. Cr. 45).

³ See sec. 117.

acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

doing one of several acts constituting an offence.

Illustrations.

(a) *A* and *B* agree to murder *Z* by severally, and at different times, giving him small doses of poison. *A* and *B* administer the poison according to the agreement with intent to murder *Z*. *Z* dies from the effects of the several doses of poison so administered to him. Here *A* and *B* intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) *A* and *B* are joint jailors, and as such have the charge of *Z*, a prisoner, alternately for six hours at a time. *A* and *B*, intending to cause *Z*'s death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish *Z* with food supplied to them for that purpose. *Z* dies of hunger. Both *A* and *B* are guilty of the murder of *Z*.

(c) *A*, a jailor, has the charge of *Z*, a prisoner. *A*, intending to cause *Z*'s death, illegally omits to supply *Z* with food: in consequence of which *Z* is much reduced in strength, but the starvation is not sufficient to cause his death. *A* is dismissed from his office, and *B* succeeds him. *B*, without collusion or co-operation with *A*, illegally omits to supply *Z* with food, knowing that he is likely thereby to cause *Z*'s death. *Z* dies of hunger. *B* is guilty of murder; but as *A* did not co-operate with *B*, *A* is guilty only of an attempt to commit murder.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Several persons committing criminal act may be guilty of different offences.

Illustration.

A attacks *Z* under such circumstances of grave provocation that his killing of *Z* would be only culpable homicide not amounting to murder. *B*, having ill-will towards *Z*, and intending to kill him, and not having been subject to the provocation, assists *A* in killing *Z*. Here, though *A* and *B* are both engaged in causing *Z*'s death, *B* is guilty of murder, and *A* is guilty only of culpable homicide.

39. A person is said to cause an effect 'voluntarily,' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

'Voluntarily.'

Illustration.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

‘Offence.’ 40. Except in the chapter and sections mentioned in clauses two and three of this section, the word ‘offence’ denotes a thing made punishable¹ by this Code.

In chapter IV and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389, and 445, the word ‘offence’ denotes a thing punishable under this Code, or under any special or local law as hereinafter defined :

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word ‘offence’ has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine².

‘Special law.’ 41. A ‘special law’ is a law applicable to a particular subject³.

‘Local law.’ 42. A ‘local law’ is a law applicable only to a particular part of British India⁴.

‘Illegal.’ 43. The word ‘illegal’ is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action : and a person is said to be ‘legally bound to do’ whatever it is illegal in him to omit.

‘Injury.’ 44. The word ‘injury’ denotes any harm whatever ille-

¹ The expression ‘a thing made punishable’ means ‘an act or omission to which a punishment is annexed,’ 3 Mad. H. C. Rulings, xi.

² The word ‘offence’ does not extend to acts punishable under the law of England ; supra, p. 11.

In revising the Code this unremem-

berable section should be omitted, and proper words inserted in the various enactments which it mentions or to which it refers.

³ See, for instance, the list, supra, p. 7.

⁴ See, for instance, the lists, supra, pp. 8, 9, 10.

gally caused to any person, in body, mind, reputation, or property¹.

45. The word 'life' denotes the life of a human being, 'Life,' unless the contrary appears from the context.

46. The word 'death' denotes the death of a human being, 'Death,' unless the contrary appears from the context.

47. The word 'animal' denotes any living creature, other 'Animal,' than a human being².

48. The word 'vessel' denotes anything made for the 'Vessel,' conveyance by water of human beings, or of property.

49. Wherever the word 'year' or the word 'month' is 'Year,' used, it is to be understood that the year or the month is to 'Month,' be reckoned according to the British calendar.

50. The word 'section' denotes one of those portions of a 'Section,' chapter of this Code which are distinguished by prefixed numeral figures.

51. The word 'oath' includes a solemn affirmation sub-'Oath,' stituted by law for an oath, and any declaration required or authorised by law to be made before a public servant³, or to be used for the purpose of proof, whether in a Court of Justice or not⁴.

52. Nothing is said to be done or believed in good faith, 'Good faith,' which is done or believed without due care and attention⁵.

¹ And 'to injure' (sec. 482, etc.) means to cause illegally such harm.

² Sec. 47 is not superfluous: see sections 324, 326, 349, cl. 3.

³ Sec. 21.

⁴ See Act V of 1869 (Articles of War), Part III (j); X of 1873 (the Indian Oaths Act). 'Declaration' here includes the affidavits made or admissible under the Civil Procedure

Code, and Acts XXVII of 1866, IV of 1869, I of 1879, etc.

⁵ This is not a definition of good faith, but merely a declaration that the expression 'good faith,' wherever it occurs in the Code, implies the presence of such care and attention as under the circumstances are proper. It also implies (like the Roman *bona fides*) the absence of all fraud and unfair dealing.

CHAPTER III.

OF PUNISHMENTS.

Punish-
ments.

53. The punishments to which offenders are liable under the provisions of this Code are—

First,—Death ;

Secondly,—Transportation ;

Thirdly,—Penal servitude ;

Fourthly,—Imprisonment, which is of two descriptions, namely :

(1) Rigorous, that is, with hard labour.

(2) Simple.

Fifthly,—Forfeiture of property.

Sixthly,—Fine¹.

¹ To these the punishment of whipping was added by Act VI of 1864, entitled *An Act to authorise the punishment of whipping in certain cases*, the unrepealed provisions of which are as follows:—

WHEREAS it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping ; It is enacted as follows :—

I. In addition to the punishments described in section 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code^a.

II. Whoever commits any of the following offences may be punished with whipping in lieu of any punishment^b to which he may for such offence be liable under the Indian Penal Code, that is to say :—

1. Theft, as defined in section 378 of the said Code.

2. Theft in a building, tent, or vessel, as defined in section 380 of the said Code.

^a 7 Ben. 165, 167.

^b i. e. any *other* punishment. The effect of sec. 2 is that the sections therein mentioned are to be read respectively as if to each the follow-

ing words had been added: 'or in lieu of such punishment (or punishments) the offender may be punished with whipping,' F. B. Rulings, 1874, p. 953.

54. In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced Commutation of sentence of death.

3. Theft by a clerk or servant, as defined in section 381 of the said Code.

4. Theft after preparation for causing death or hurt, as defined in section 382 of the said Code.

5. Extortion by threat, as defined in section 388 of the said Code.

6. Putting a person in fear of accusation in order to commit extortion, as defined in section 389 of the said Code.

7. Dishonestly receiving stolen property, as defined in section 411 of the said Code.

8. Dishonestly receiving property stolen in the commission of a dacoity, as defined in section 412 of the said Code.

9. Lurking house-trespass, or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section ^c.

10. Lurking house-trespass by night, or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section ^c.

III. Whoever, having been previously convicted ^d of any one of the offences specified in the last preceding section, shall again be convicted of the same offence ^e, may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence be liable under the Indian Penal Code.

IV. Whoever, having been previously convicted of ^f any one of the

^c Apparently the words and figures 'paragraphs 1 to 8 (both inclusive)' have been omitted *per incuriam*. When a prisoner convicted of 'house-breaking in order to commit theft' and of 'theft,' both offences being portions of one continuous criminal act, was sentenced, on the first head of charge, to one year's rigorous imprisonment, and, on the second, to twenty stripes, the High Court disapproved of the separate sentences, as, though not illegal, they were contrary to the spirit and intention of the Whipping Act, 5 Bom. H. C., Cr. Ca. 83.

^d 3 Bom. H. C., Cr. Ca. 38. The previous conviction required by this section may be on the same day, and

the section does not mean 'previously convicted and punished,' 5 Mad. H. C. Rulings, xviii.

The section does not apply where the second conviction is for an offence committed previously to the first conviction, 3 Bom. H. C., Cr. Ca. 38: 7 *ibid.* Cr. Ca. 70.

It applies to juvenile, as well as to adult, offenders, 7 Bom. H. C., Cr. Ca. 70.

^e i. e. the same specific offence, 5 Mad. H. C. Rulings, xxxix.

^f and punished for, 4 Ben. App. Cr. 5. The object of this section is, 'that where a person, notwithstanding a previous conviction of dacoity and consequent punishment, and after having had a *locus poenitentiae*

may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

following offences, shall be again convicted of the same offence, may be punished with whipping in addition to any other punishment to which he may be liable under the Indian Penal Code, that is to say :—

1. Giving or fabricating false evidence in such manner as to be punishable under section 193 of the Indian Penal Code.

2. Giving or fabricating false evidence with intent to procure conviction of a capital offence, as defined in section 194 of the said Code.

3. Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment, as defined in section 195 of the said Code.

4. Falsely charging any person with having committed an unnatural offence, as defined in sections 211 and 377 of the said Code.

5. Assaulting or using criminal force to any woman with intent to outrage her modesty, as defined in section 354 of the said Code.

6. Rape, as defined in section 375 of the said Code.

7. Unnatural offences, as defined in section 377 of the said Code.

8. Robbery or dacoity, as defined in sections 390 and 391 of the said Code.

9. Attempting to commit robbery^h, as defined in section 393 of the said Code.

10. Voluntarily causing hurt in committing robbery, as defined in section 394 of the said Code.

11. Habitually receiving or dealing in stolen property, as defined in section 413 of the said Code.

12. Forgery, as defined in section 463 of the said Code.

13. Forgery of a document, as defined in section 466 of the said Code.

afforded to him, again, after completing a previous sentence, commits the same offence, he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and therefore may be punished on the second occasion with stripes in addition,' 4 Ben. App. Cr. 5, 6.

^g This probably means 'Falsely charging any person with having

committed an unnatural offence (as defined in sec. 377 of the said Code), when the person making the charge intends to cause injury to the person charged, and knows that there is no just or lawful ground for such charge.'

^h This is the only attempt included among the offences specified in sec. 4; see 3 Bom. H. C., Cr. Ca. 37.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years¹.

Commutation of sentence of transportation for life.

14. Forgery of a document, as defined in section 467 of the said Code.

15. Forgery for the purpose of cheating, as defined in section 468 of the said Code.

16. Forgery for the purpose of harming the reputation of any person, as defined in section 469 of the said Code.

17. Lurking house-trespass or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section¹.

18. Lurking house-trespass by night or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section¹.

V. Any juvenile offender^k who commits any offence which is not by the Indian Penal Code punishable with death, may, whether for a first or any other offence, be punished with whipping in lieu of any other punishment to which he may for such offence be liable under the said Code.

VI. Whenever any Local Government shall, by notification in the official Gazette, have declared the provisions of this section to be in force in any Frontier District or any wild tract of country within the jurisdiction of such Local Government, any person who shall in such district or tract of country after such notification as aforesaid commit any of the offences specified in section IV of this Act, may be punished with whipping in lieu of any other punishment to which he may be liable under the Indian Penal Code¹.

¹ Apparently the words and figures 'paragraphs 1 to 16, both inclusive,' should be added.

^k i.e. an offender under 16 years of age, 6 All. 482. Under Act IV of 1879, s. 44, boys under 12 may be punished with whipping for obstruct-

ing a railway-line or throwing stones at a train.

¹ In revising this Code the enactments contained in secs. I-VI of the Whipping Act should be inserted in their proper places.

¹ Where the judge passing such a sentence considers that there are grounds for remitting it, he should

address the Local Government, 5 Suth., Cr. Letters, 2. See Cr. P. Code, ss. 401, 402.

Penal
servitude.

56. Whenever any person being a European or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude, instead of transportation, according to the provisions of Act XXIV of 1855:

Provided that, where an European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

Fractions
of terms
of punish-
ment.

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

Offenders
sentenced
to trans-
portation
how dealt
with until
trans-
ported.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment¹.

When
transporta-
tion may be
substi-
tuted for
imprison-
ment.

59. In every case in which an offender is punishable² with imprisonment³ for a term of seven years or upwards, it shall be competent to the Court which sentences⁴ such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment⁵.

¹ See Act IX of 1882, amending the Prisoners' Act, 1871.

² This means 'whenever an offender is punishable *by the Court trying him*, on any one charge,' or 'for any one offence,' 8 *Suth. Cr.* 2, following 2 *Suth. Cr.* 1; 5 *Suth. Cr.* 44, col. 2. The section does not say in 'every case in which a person is convicted of an offence punishable,' &c. A magistrate of the first class or a Presidency Magistrate in trying an offence punishable with seven years' imprisonment cannot sentence the offender to transportation, see *F. B. R.* 878, per Peacock C. J. (*S. C.* 9 *Suth. Cr.* 6).

³ i.e. imprisonment as a substantive punishment. Therefore, where

an offence is punishable with imprisonment for ten years and with fine, the Court cannot sentence the offender to transportation and fine, and to further transportation in default of payment, 5 *Mad.* 28.

⁴ 'which sentences' here means 'in sentencing.' The Court cannot first pass a sentence of imprisonment and then commute it, *Suth.* 1864, *Cr.* 35.

⁵ 5 *Mad.* 28. When an offence is punishable either with transportation for life or imprisonment which may extend to ten years, if a sentence of transportation for a term less than life is awarded, the term cannot exceed ten years, 1 *All.* 43, 45.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple¹.

61. In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.

Illustration.

A being convicted of waging war against the Government of India, is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, A's father dies, leaving an estate which, but for the forfeiture, would become the property of A. The estate becomes the property of Government.

62. Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government; and whenever any person shall be convicted of any offence for which he shall be transported, or sentenced to imprisonment for a term of seven years or upwards², the Court may adjudge that the rents and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependants as the Government may think fit to allow during such period.

63. Where no sum is expressed to which a fine may extend³, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. In every case of an offence⁴ punishable with imprisonment

¹ And now see Act V of 1876, ss. 7, 8, 9, as to the committal of juvenile offenders to a reformatory.

² Forfeiture can be inflicted in no other case, 8 Suth. Cr. 35, col. 1.

³ See p. 25, supra.

⁴ Here 'offence' denotes not only a thing punishable under the Code, but also a thing punishable under any special or local law: see sec. 40, cl. 2.

in default
of pay-
ment of
fine.

ment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence¹ punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence.

When
offence
punish-
able with
imprison-
ment as
well as
fine.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine, shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence¹, if the offence be punishable with imprisonment as well as fine².

Descrip-
tion of im-
prisonment
for such
default.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence¹.

When of-
fence pun-
ishable
with fine
only.

67. If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

Termina-
tion of such
imprison-
ment.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

¹ See note 3, p. 19.

² If imprisonment and fine, and further imprisonment in default of payment of the fine is the sentence, the imprisonment in default cannot exceed one fourth of the period of imprisonment which the Court is com-

petent to inflict for the offence. But if the sentence is fine only, the imprisonment in default of payment may be the whole period of imprisonment which the Court is competent to inflict for the offence, 1 Mad. 277. See also the Cr. P. C. sec. 33.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration.

A is sentenced to a fine of one hundred rupees, and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

70. The fine, or any part thereof which remains unpaid, may be levied¹ at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property² which would, after his death, be legally liable for his debts³.

71. Where anything which is an offence⁴ is made up of parts, any of which parts is itself an offence⁴, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided⁵.

¹ The law provides for levying fines by the distress and sale of *moveable* property only, 2 Bom. 567; 5 Bom. H. C., Cr. Ca. 63; Act X of 1882, s. 386.

² So in England the executor or administrator of an offender who has been fined must pay the fine out of the assets come to his hands.

³ Sec. 70 was held to refer only to cases which have been dealt with under the Code, 5 R. J. & P. 213, cited Mayne, P. C. 40.

⁴ Sec. 40, cl. 2.

⁵ The meaning of this section is that 'if in the course of a transaction a person commits different offences, inextricably mixed up with one another, and all graduating towards, essential to, and culminating in a single distinct offence, he is not to be punished separately upon conviction for such single and distinct offence, and for any or each of such other offences as well. For example, a man holds up his fist to another in a threatening manner, then he strikes him a slight blow with a stick, and ends by stab-

Where anything is an offence¹ falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

Illustrations.

(a) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating².

(b) But if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*.

Where doubtful of which of several offences a person is guilty.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the

bing him with a knife. Technically, he has committed an assault, has caused hurt, and has caused grievous hurt; but no one would seriously contend that he should be punished separately for each of such offences.' So where a man 'was a member of an unlawful assembly, he participated in a riot, and in the course of such riot grievous hurt was caused by persons other than himself, for which he was responsible in law as if his own hand had inflicted it, by reason of his being a member of an unlawful assembly of which they also were members. It was permissible to try and convict him for riot, and for causing hurt or grievous hurt, as the case might be, in respect of each person assaulted, subject, of course, to the limitations of sec. 234 of the Criminal Procedure Code as to the number of charges joined; but while he might be punished for the riot, or upon each of the charges of grievous hurt separately, I do not think that

different sentences can be passed for the riot and in respect of one or each of such other charges as well. In my opinion the riot is a part of those other offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot,' per Straight J., 6 All. 124, 125. So where *A* was found guilty of housebreaking under sec. 457, and of theft in a dwelling-house under sec. 380, committed on the same occasion, *A* can only be sentenced to punishment for one of these offences, 1 Bom. H. C. 87. See also Cr. P. C. sec. 235, which expressly saves sec. 71 of the Penal Code.

¹ Sec. 40, cl. 2.

² So a number of lies in a continuous deposition only constitute one piece of false evidence, though the same lie in two depositions would be punishable separately as two distinct offences; Mayne, P. C. 43, citing *Castro v. The Queen*, L. R. 6 App. 229.

lowest punishment is provided if the same punishment is not provided for all¹.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment², the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say—

A time not exceeding one month if the term of imprisonment shall not exceed six months.

A time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year.

A time not exceeding three months if the term of imprisonment shall exceed one year.

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods³.

75. Whoever, having been convicted⁴ of an offence punishable with imprisonment, shall be sentenced to that punishment (M. & M. 51).

¹ The following are illustrations of this section:—

(a) *A* is charged with a simple assault on *Z*, with assaulting her with intent to wound her and with assaulting her with intent to rape her. It is clear on the evidence that he is guilty of one of these offences: but it is doubtful of which. *A* must be punished for the simple assault.

(b) It is clear on the evidence that either *A* or *B* murdered *Z*, and that whichever was the murderer was aided by the other in the commission of the offence: but it is impossible to ascertain which committed the murder and which aided the commission. The punishment for both these offences is the same, and both *A* and *B* are liable

to that punishment (M. & M. 51).

(c) *A* is charged with giving false evidence in a judicial proceeding. It is proved that he made two contradictory statements and that one of them was false and known to be false; but there is nothing to show which of them was false. *A* may be convicted upon an alternative finding that he gave false evidence in one or other of the two statements (F. B. R. 521; 3 Ben. App. Cr. 36; 4 Ben. App. Cr. 9). As to proof of contradictory statements on oath or solemn affirmation, without evidence as to which of them is false, see 4 Mad. H. C. 51.

² See p. 20, supra.

³ 3 Ben. App. Cr. 49.

⁴ 1 All. 637.

punishable with three years' imprisonment against coin, stamps, or property. able¹ under chapter XII or chapter XVII of this Code² with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those chapters³ with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years⁴.

¹ The punishment actually awarded for the former offence need not be imprisonment for three years.

² The previous convictions here referred to must have been *after* the Code came into force, 4 Bom. H. C., Cr. Ca. 11, and of offences committed after that time, 4 Suth. Cr. 9; 3 Suth. Cr. 17; and the offender must, according to the Bengal High Court, have undergone his imprisonment for his previous offence, 5 Suth. Cr. 66. But, as Mr. Mayne observes, if a prisoner, in gaol for theft, commits another theft in gaol, it is hard to say why he should not receive an enhanced punishment.

³ If a person who has been convicted of such an offence is convicted of an *attempt* to commit any such offence, he does not thereby become

liable to the enhanced punishment allowed by sec. 75, for attempts are punishable under chap. XXIII, 5 Bom. 140; 3 All. 773.

⁴ Act X of 1886, sec. 22. Before this Act was passed, in case of an offender convicted (say) of simple theft, when he had been previously convicted of a similar offence, and when the Court considered a sentence of imprisonment for six years is not sufficient, it must either pass an inadequate sentence or else sentence him to transportation for life, which might be more than it considered necessary.

For forms of charges alleging previous convictions, see Act X of 1882, Sched. V, No. XXVIII, and 4 Mad. H. C. Rulings, x.

CHAPTER IV.

GENERAL EXCEPTIONS.

76. Nothing is an offence which is done by a person who is, or¹ who by reason of a mistake of fact² and not by reason of a mistake of law in good faith³ believes himself to be, bound by law to do it.

Act done by one bound, or by mistake of fact believing himself bound by law.

Illustrations.

(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

77. Nothing is an offence which is done by a Judge⁴ when acting judicially⁵ in the exercise of any power which is, or which in good faith³ he believes to be, given to him by law.

Act of Judge acting judicially.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of a Court of Justice⁶, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Act done pursuant to judgment or order of Court.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact

Act done by one justified,

¹ The words 'who is, or' and illustration (a) seem superfluous. *Ex vi termini* a person who is bound by law to do a thing commits no offence by doing that thing.

² i. e. ignorance of circumstances which constitute or increase criminality.

³ Sec. 52.

⁴ Sec. 19.

⁵ This refers not merely to acts in Court, acts *sedente curia*, but to all

acts of a judicial nature, 2 Moo. I. A. 308. So in England, no judge, juror, coroner or arbitrator is liable for his judicial acts unless he exceeds the bounds of his authority. A magistrate removing an obstruction under the conservancy-provisions of Bengal Act VI of 1868, is not 'acting judicially,' 14 Ben. 254 (S. C. 21 Suth. 391), and is therefore not protected by sec. 77.

⁶ Sec. 20.

or by mistake of fact believing himself justified by law.

and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

Illustration.

A sees *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes *Z*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that *Z* was acting in self-defence.

Accident in doing lawful act.

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act¹ in a lawful manner, by lawful means, and with proper care and caution².

Illustration.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of *A*, his act is excusable and not an offence³.

Act likely to cause harm, but done without criminal intent, and to prevent other harm.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations.

(a) *A*, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat, *B*, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat, *C*, with only two passengers on board, which he may possibly clear. Here, if *A* alters

¹ An act lawful by the general law of the land, *M. & M.* 58, not a private right: see *Cooper v. Phibbs*, *L. R.* 2 *H. L.* 170, per Lord Westbury.

² i. e. that degree of care and attention which a man of ordinary prudence and activity employs in his daily occupations.

³ This illustration assumes the absence of criminal intention or knowledge in working with the hatchet. Other illustrations of sec. 80 are:—

A undertakes to treat *Z* for a dangerous disease. *A* has no skill or knowledge of medicine to justify him in doing so. *Z* dies of the disease. *A* cannot plead this section.

A flogs his child *Z* immoderately, or with a cat-o'-nine-tails, and *Z* dies of the flogging. Here, though *A* might lawfully have administered reasonable correction to *Z*, with a proper instrument, he cannot plead this section.

his course without any intention to run down the boat *C*, and in good faith for the purpose of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C* by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C*.

(b) *A* in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*'s act, *A* is not guilty of the offence.

82. Nothing is an offence which is done by a child under seven years of age. Act of child under 7 years.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion ¹. Act of child above 7 and under 12.

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law ². Act of person of unsound mind.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will ³. Involuntary intoxication.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be Offence requiring particular intent or know-

¹ 1 *Suth. Cr.* 43. As to punishing juvenile offenders (i.e. males under 16) with whipping in lieu of any other punishment to which they may be liable, see *Act VI of 1864* (the Whipping Act), sec. 5; *supra*, p. 107.

² *A*, a Hindu, sacrifices his child to Mahadeva because wealth did not accompany its birth, in the belief that the child would be restored to life and that wealth would simultaneously accrue to *A*. Here, though there may have been religious hallucination, there is nothing to show the

incapacity mentioned in sec. 84. *A* accordingly is guilty of murder, 7 *Suth. Cr.* 100, 102. The fact of unsoundness of mind must be clearly and distinctly proved before any jury is justified in returning a verdict under sec. 84; 13 *Ben. Appx.* 20.

³ Drunkenness does not aggravate an offence. It is no excuse, and an act, which when committed by a sober man is an offence, is equally an offence when committed by a drunken man if the intoxication was voluntarily caused, 8 *Ben. Appx.* 22, per Macpherson J.

ledge committed during voluntary intoxication. dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will ¹.

Act not intended and not known to be likely to cause death or grievous hurt, done by consent. **87.** Nothing, which is not intended to cause death or grievous hurt ², and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Act not intended to cause death done by consent in good faith for benefit of person. **88.** Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit ³ it is done in good faith ⁴, and who has given a consent ⁵, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

Act done in good faith for benefit of child. **89.** Nothing, which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian

¹ See as to this section *supra*, p. 13. When A killed Z in a sudden and general squabble originated by B and Z himself, in which A and others ultimately took part, and all the parties were intoxicated, A was convicted of culpable homicide not amounting to murder, *Suth. 1864*,

Cr. 24, where Glover J. said that voluntary drunkenness is generally taken into account as throwing light on the question of intention.

² Sec. 320.

³ Sec. 92, *expl.*

⁴ Sec. 52.

⁵ Sec. 90.

or other person having lawful charge of that person, is an or person
 offence by reason of any harm which it may cause, or be of unsound
 intended by the doer to cause, or be known by the doer to be mind, by
 likely to cause, to that person: Provided— or by consent of
 guardian.

First.—That this exception shall not extend to the intentional causing of death, or to the attempting¹ to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt², or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt², or to the attempting to cause grievous hurt², unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.—That this exception shall not extend to the abetment³ of any offence, to the committing of which offence it would not extend.

Illustration.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under Consent known to be given under fear or misconception.
 fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception—or

If the consent is given by a person who, from unsound-Consent of person of unsound mind, intoxicated, or under
 ness of mind or intoxication⁴, is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context⁵, if the

¹ As to attempts see sec. 511, and supra, p. 67.

² See sec. 320.

³ See secs. 107, 108.

⁴ It does not seem to matter whether the intoxication is voluntary or involuntary.

⁵ See sec. 375, cl. 5.

consent is given by a person who is under twelve years of age¹.

Acts which
are offences
inde-
pendently
of harm
caused to
person con-
senting.

91. The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore it is not an offence 'by reason of such harm;' and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Act done
in good
faith for
benefit of
person,
without
consent.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. Provided—

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt², or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt², or to the attempting³ to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.—That this exception shall not extend to the abetment⁴ of any offence, to the committing of which offence it would not extend.

Illustrations.

(a) Z is thrown from his horse, and is insensible. A, a surgeon,

¹ This section should be in Chap. II. with the other definitions. 'Consent' occurs in secs. 87, 88, 89, 91, 92, and 300, exc. 5.

² See sec. 321.

³ See note 1, p. 119.

⁴ See secs. 107, 108.

finds that *Z* requires to be trepanned. *A*, not intending *Z*'s death, but in good faith¹, for *Z*'s benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.

(b) *Z* is carried off by a tiger. *A* fires at the tiger knowing it to be likely that the shot may kill *Z*, but not intending to kill *Z*, and in good faith¹ intending *Z*'s benefit. *A*'s ball gives *Z* a mortal wound. *A* has committed no offence.

(c) *A*, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. *A* performs the operation in spite of the entreaties of the child, intending, in good faith¹, the child's benefit, *A* has committed no offence.

(d) *A* is in a house which is on fire, with *Z*, a child. People below hold out a blanket. *A* drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith¹, the child's benefit. Here, even if the child is killed by the fall, *A* has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

93. No communication made in good faith¹ is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. Communication in good faith.

Illustration.

A, a surgeon, in good faith¹, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

94. Except murder and offences against the State, punishable with death², nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint. Compulsion.

*Explanation 1*³.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this

¹ See sec. 52.

² See secs. 121, 132.

³ This and explanation 2 are illustrations, rather than explanations.

exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law, for example a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

Act causing slight harm.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm¹.

OF THE RIGHT OF PRIVATE DEFENCE.

Private defence.

96. Nothing is an offence which is done in the exercise of the right of private defence.

Right of private defence of body and property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body, and the body of any other person, against any offence affecting the human body;

Secondly.—The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass².

Right of private defence against act of person of unsound mind, &c.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

¹ e.g. picking pods, value three pies, off a moringa tree standing in a waste piece of Government ground, 5 Bom. H. C., Cr. Ca. 35. But sec. 95 does not deprive of its criminality a blow (though almost painless) across the chest with an umbrella, where the striker was a dismissed policeman and the person stricken a District Superintendent of Police, 24 Suth. Cr. 67. The 'person of ordinary sense and

temper' must be a member of the class to which the complainant belongs; Mayne, P. C. p. 84. Sec. 95 does not affect the Madras Regulations as to trivial offences, XI of 1816, sec. 10, and IV of 1821, sec. 6.

² 6 Bom. Appx. 9. 'Theft' is defined in sec. 378; 'robbery' in sec. 390; 'mischief' in sec. 425; and 'criminal trespass' in sec. 441.

Illustrations.

(a) *Z*, under the influence of madness, attempts to kill *A*; *Z* is guilty of no offence. But *A* has the same right of private defence which he would have if *Z* were sane.

(b) *A* enters by night a house which he is legally entitled to enter. *Z*, in good faith¹, taking *A* for a house-breaker, attacks *A*. Here *Z*, by attacking *A* under this misconception, commits no offence. But *A* has the same right of private defence against *Z*, which he would have if *Z* were not acting under that misconception.

99. First.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt², if done, or attempted to be done, by a public servant acting in good faith¹ under colour of his office, though that act may not be strictly justifiable by law³.

Acts against which no right of private defence.

Second.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt², if done, or attempted to be done, by the direction of a public servant acting in good faith¹ under colour of his office, though that direction may not be strictly justifiable by law.

Third.—There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities⁴.

Fourth.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence⁵.

Extent to which right may be exercised.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant⁶, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant⁶, unless he knows, or has

¹ See sec. 52.

² See sec. 320.

³ For example, where a subordinate police officer enters a house, without a search-warrant, in search of property, 7 Bom. H. C., Cr. Ca. 50, 52.

⁴ 9 Cal. 639, 641.

⁵ 6 Suth. Cr. 89, 90. When, therefore, *A* caught *Z*, a weak, half-starved old woman, stealing his paddy, and

beat her so severely as to kill her, he was held guilty of murder: a slight imposition of hands would have been sufficient to protect the paddy, 5 Suth. Cr. 33. Excessive force in such cases constitutes, not a specific crime, but a *novum delictum* in which the extenuating circumstances are strong.

⁶ Sec. 21.

reason to believe, that the person doing the act is acting by such direction ; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded ¹.

When right of private defence of body extends to causing death.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section ², to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely—

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault ;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt ³ will otherwise be the consequence of such assault ;

Thirdly.—An assault with the intention of committing rape ⁴ ;

Fourthly.—An assault with the intention of gratifying unnatural lust ⁵ ;

Fifthly.—An assault with the intention of kidnapping ⁶ or abducting ⁷ ;

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

When such right extends to causing other harm.

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death ⁸.

Commencement and

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body

¹ It seems that there is no right of defence when the assaulted person, believing that he will be assaulted, courts the assault, *Suth. 1864, Cr. 11.*

² Clauses 3 and 4.

³ *Sec. 320.*

⁴ *Sec. 375.*

⁵ *Sec. 377.*

⁶ *Sec. 359.*

⁷ *Sec. 362.*

⁸ *3 Suth. Cr. 47.*

arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely—

First.—Robbery¹;

Secondly.—House-breaking by night²;

Thirdly.—Mischief by fire³ committed on any building, tent or vessel⁴, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.—Theft, mischief, or house-trespass⁵, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass⁶, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

105. *First.*—The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Second.—The right of private defence of property against theft continues till the offender has effected his retreat with the property or the assistance of the public authorities is obtained, or the property has been recovered.

¹ Sec. 390.

² Sec. 446.

³ Secs. 425, 435.

⁴ Sec. 48.

⁵ Secs. 378, 425, 442.

⁶ Secs. 378, 425, 441.

Third.—The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint¹, or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

Fourth.—The right of private defence of property against criminal trespass² or mischief³ continues as long as the offender continues in the commission of criminal trespass or mischief.

Fifth.—The right of private defence of property against house-breaking by night⁴ continues as long as the house-trespass which has been begun by such house-breaking continues.

Right of private defence against deadly assault when risk of harm to innocent person.

106. If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

¹ Sec. 339.

² Sec. 441.

³ Sec. 425.

⁴ Sec. 446.

CHAPTER V.

OF ABETMENT.

107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Abetment
defined.

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing¹; or,

Thirdly.—Intentionally aids, by any act or illegal omission², the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing³.

Illustration.

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here, B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to

¹ As to the evidence of a conspiracy to abet a woman to become a *sati*, see 3 N. W. P. 316. As to conspiring to enhance the price of opium at Government opium sales, 5 Moo. I. A. 109. In 8 Suth. Cr. 79, col. 1, the accused having 'resiled' from his agreement to join others in committing a theft, was held not to fall within clause 2.

² An omission to give information that a crime has been committed does not, under this section, amount to abetment unless such omission in-

volves a breach of a legal obligation, 4 Ben. App. Cr. 7.

³ Whether an instigation to murder by sorcery or other impossible means is 'abetment' within this section, is a question raised, but not decided, in 10 Bom. H. C. 76, 82.

Where A merely allowed an unlawful marriage to take place in his house, he was held not guilty of abetting the marriage, Suth. 1864, Cr. 14.

facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act¹.

Abettor.

108. A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act².

Explanation 2.—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations.

(a) *A* instigates *B* to murder *C*. *B* refuses to do so. *A* is guilty of abetting *B* to commit murder.

(b) *A* instigates *B* to murder *D*. *B*, in pursuance of the instigation, stabs *D*. *D* recovers from the wound. *A* is guilty of instigating *B* to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations.

(a) *A*, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence if committed by a person capable by law of committing an offence, and having the same intention as *A*. Here *A*, whether the act be committed or not, is guilty of abetting an offence.

(b) *A*, with the intention of murdering *Z*, instigates *B*, a child under seven years of age, to do an act which causes *Z*'s death. *B*, in consequence of the abetment, does the act, and thereby causes *Z*'s death. Here, though *B* was not capable by law of committing an offence, *A* is liable to be punished in the same manner as if *B* had been capable by law of committing an offence and had committed murder, and he is therefore subject to the punishment of death.

¹ The supplying of necessary food to a person known to be engaged in crime is not *per se* criminal; secus if food were supplied in order that the criminal might go on a journey to the intended scene of the crime, or conceal himself while waiting for an

opportunity to commit it, 2 Mad. 139.

² Thus if *A* instigates *B*, a public servant, to be guilty of an illegal omission of his duty, which omission is punishable by the Code, *A* is guilty of an offence, M. & M. 86, 87.

(c) *A* instigates *B* to set fire to a dwelling-house. *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of *A*'s instigation. *B* has committed no offence, but *A* is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d) *A*, intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z*'s possession. *A* induces *B* to believe that the property belongs to *A*. *B* takes the property out of *Z*'s possession, in good faith believing it to be *A*'s property. *B*, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But *A* is guilty of abetting theft, and is liable to the same punishment as if *B* had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence¹.

Illustration.

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence in consequence of *B*'s instigation. *B* is liable to be punished for his offence with the punishment for murder; and as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.

Illustration.

A consents with *B* a plan for poisoning *Z*. It is agreed that *A* shall administer the poison. *B* then explains the plan to *C*, mentioning that a third person is to administer the poison, but without mentioning *A*'s name. *C* agrees to procure the poison, and procures and delivers it to *B* for the purpose of its being used in the manner explained. *A* administers the poison; *Z* dies in consequence. Here, though *A* and *C* have not conspired together, yet *C* has been engaged in the conspiracy in pursuance of which *Z* has been murdered. *C* has therefore committed the offence defined in this section, and is liable to the punishment for murder.

109. Whoever abets any offence² shall, if the act abetted is committed in consequence of the abetment, and no express

Abetment
if act
abetted is

¹ Where *A* instigated *B* to abet *A* in committing a theft of the property of *B*'s master, and *B*, with the knowledge and consent of his master and for the purpose of procuring *A*'s

punishment, aided *A* in removing the property, held that, though no theft had been committed, *A* was guilty of abetment, 4 Cal. 366.

² Sec. 40, cl. 2.

committed
in conse-
quence
and no
express
provision
made for
punish-
ment.

provision is made by this Code for the punishment of such abetment¹, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment².

Illustrations.

(a) *A* offers a bribe to *B*, a public servant³, as a reward for showing *A* some favour in the exercise of *B*'s official functions. *B* accepts the bribe. *A* has abetted the offence defined in section 161.

(b) *A* instigates *B* to give false evidence⁴. *B*, in consequence of the instigation, commits that offence. *A* is guilty of abetting that offence, and is liable to the same punishment as *B*.

(c) *A* and *B* conspire to poison *Z*. *A*, in pursuance of the conspiracy, procures the poison and delivers it to *B*, in order that he may administer it to *Z*. *B*, in pursuance of the conspiracy, administers the poison to *Z* in *A*'s absence and thereby causes *Z*'s death. Here *B* is guilty of murder. *A* is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

Abetment
if person
abetted
acts with
different
intention
from that
of abettor.

110. Whoever abets the commission of an offence⁵ shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Liability of
abettor
when one
act is
abetted
and dif-
ferent act
done.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it; provided the act done was a probable consequence of the abetment⁶, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment⁷.

¹ See secs. 121, 122, 131, 132, etc.

² Thus a priest who officiates at an illegal marriage is an abettor, but mere presence at, or the grant of accommodation in a house for, such a marriage, is not such 'aid' as constitutes abetment, 6 Bom. 126. As to cases in which abetments may be tried summarily, see Cr. P. C. secs.

260, cl. (j), 261, cl. (c).

³ Sec. 21.

⁴ Sec. 191.

⁵ Sec. 40, cl. 2.

⁶ It is not necessary that the abettor should know it to be a probable consequence, M. & M. 91.

⁷ The test in these cases must always be whether, having regard to

Illustrations.

(a) *A* instigates a child to put poison into the food of *Z*, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of *Y*, which is by the side of that of *Z*. Here, if the child was acting under the influence of *A*'s instigation, and the act done was under the circumstances a probable consequence of the abetment, *A* is liable in the same manner, and to the same extent, as if he had instigated the child to put the poison into the food of *Y*.

(b) *A* instigates *B* to burn *Z*'s house. *B* sets fire to the house, and at the same time commits theft of property there. *A*, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c) *A* instigates *B* and *C* to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. *B* and *C* break into the house, and being resisted by *Z*, one of the inmates, murder *Z*. Here, if that murder was the probable consequence of the abetment, *A* is liable to the punishment provided for murder.

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence¹, the abettor is liable to punishment for each of the offences.

Cumulative punishment for act abetted and for act done.

Illustration.

A instigates *B* to resist by force a distress made by a public servant². *B*, in consequence, resists that distress. In offering the resistance, *B* voluntarily causes grievous hurt to the officer executing the distress. As *B* has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, *B* is liable to punishment for both these offences; and if *A* knew that *B* was likely voluntarily to cause grievous hurt in resisting the distress, *A* will also be liable to punishment for each of the offences.

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the

Liability of abettor for effect caused by act abetted different

the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. The determination of this question as to the state of a man's mind at a particular moment must

necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts,' 6 All. 495, per Straight Offg. C.J.

¹ Sec. 40, cl. 2.

² Sec. 21.

Illustration.

A affixes in a public place a placard, instigating a sect consisting of more than ten members to meet at a certain time and place for the purpose of attacking the members of an adverse sect while engaged in a procession. A has committed the offence defined in this section.

Concealing
design to
commit
offence
punishable
with death
or trans-
portation
for life.

118. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or transportation for life¹, voluntarily conceals, by any act or illegal omission², the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years; or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to fine.

Illustration.

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

Public
servant
concealing
design to
commit
offence
which he
should
prevent.

119. Whoever, being a public servant³, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence⁴ the commission of which it is his duty as such public servant to prevent, voluntarily conceals, by any act or illegal omission², the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both; or, if the offence be punishable with death or transportation for life¹, with imprisonment of either description for a term which may

¹ Supra, p. 25.

² The words 'illegal omission' apply only to persons bound by law to report offences (M. & M. 95). As 'act' includes 'illegal omission'

(sec. 32) these words seem unnecessary.

³ Sec. 21.

⁴ Sec. 40.

extend to ten years; or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Illustration.

A, an officer of Police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that *B* designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here *A* has by an illegal omission concealed the existence of *B*'s design, and is liable to punishment according to the provision of this section.

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission¹, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Concealing
design to
commit
offence
punishable
with im-
prison-
ment.

¹ See note 2, p. 134.

CHAPTER VI.

OF OFFENCES AGAINST THE STATE ¹.

Waging,
attempting
to wage, or
abetting
waging
of war
against
Queen.

121. Whoever² wages war against the Queen, or attempts³ to wage such war, or abets the waging of such war, shall be punished with death, or transportation for life, and shall forfeit all his property⁴.

Illustrations.

(a) A joins an insurrection against the Queen. A has committed the offence defined in this section.

(b) A in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen⁵.

Conspiring
to commit
offences
punishable
by section
121.

121A. Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India or of any part thereof, or conspires to overawe, by means of criminal force⁶ or the show of criminal force, the Government of India⁷ or any local Government⁸, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years.

¹ No Court can take cognizance of any offence punishable under this chapter (except sec. 127), unless upon complaint made by order of, or under authority from, the Government, Cr. P. C. sec. 196.

² This includes foreigners owing local allegiance.

³ As to attempts, see *supra*, p. 67, and *infra*, sec. 511.

⁴ These offences are under the Penal Code only, and are not 'treason' or 'misprision of treason.' The three-years' limitation provided by 7 & 8 Wm. III. c. 3. s. 5, does not therefore apply, 7 Ben. 63, 69.

As to the duty of the public to give information of the offences punishable under secs. 121-126, and

130, see Cr. P. C. (Act X of 1882), sec. 44.

⁵ When the common object of the persons composing an assembly of five or more persons is to overawe the Government by an *immediate* exercise of force, Mr. Mayne (citing Lord Mansfield in *E. v. Gordon*, Doug. 592), thinks that this is a 'waging of war,' not an unlawful assembly (sec. 141). Otherwise, he thinks, if the threat is to employ force at some *indefinite* future period. He does not say what the result is if the force is to be employed at a definite future period.

⁶ Sec. 350.

⁷ Sec. 16.

⁸ Sec. 17.

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

122. Whoever collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall forfeit all his property.

Preparing to wage war against Queen.

123. Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Queen, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Concealing design to wage war.

124. Whoever, with the intention of inducing or compelling the Governor-General of India, or the Governor of any Presidency¹, or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of any Presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant-Governor, or Member of Council, assaults² or wrongfully restrains³, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor, or Member of Council, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Assaulting Governor-General &c. with intent to compel or restrain exercise of lawful power.

124 A. Whoever by words, either spoken or intended to be read, or by signs, or by visible representation or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which

Exciting disaffection.

¹ Sec. 18.

² Sec. 351.

³ Sec. 339.

may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.

Waging
war against
allied
Asiatic
power.

125. Whoever wages war against the Government of any Asiatic power in alliance or at peace with the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life¹, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years², to which fine may be added, or with fine.

Com-
mitting de-
predation
on terri-
tories of
friendly
power.

126. Whoever commits depredation³, or makes preparations to commit depredation, on the territories of any power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used, or intended to be used, in committing such depredation, or acquired by such depredation.

Receiving
property
taken by
war or
depreda-
tion.

127. Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

Public ser-
vant volun-
tarily

128. Whoever, being a public servant⁴, and having the custody of any State Prisoner or Prisoner of War⁵, volun-

¹ Transportation for ten years cannot be inflicted, 3 *Suth. Cr.* 16, col. 2.

² This is commutable under sec. 59.

³ Something more than a mere outrage against the property of an individual seems contemplated; probably the licence which Native chiefs sometimes use, or allow their people

to use, of making predatory expeditions into adjacent territory to plunder cattle, grain, etc., *M. & M.* 105.

⁴ Sec. 21.

⁵ Under Ben. Reg. III of 1818, *Mad. Reg.* II of 1819, or *Bom. Reg.* XXV of 1827, extended by Acts XXXIV of 1850 and III of 1858.

tarily¹ allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

allowing
prisoner
of State or
War to
escape.

129. Whoever, being a public servant, and having the custody of any State prisoner or prisoner of War², negligently³ suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

Public ser-
vant negli-
gently suf-
fering such
prisoner to
escape.

130. Whoever knowingly aids or assists any State prisoner or prisoner of War in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours⁴ or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Aiding
escape of,
rescuing, or
harbouring
such
prisoner.

Explanation.—A State prisoner or prisoner of War who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

¹ Sec. 39.

² See note 5, p. 138.

³ The mere fact of an escape is *prima facie* evidence of negligence on the part of the keeper.

⁴ No exception is made here (as in secs. 136, 212, 216) in favour of the prisoner's wife or any other member of his family.

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

Abetting
mutiny, or
attempting
to seduce
soldier or
sailor from
duty.

131. Whoever abets the committing of mutiny by an officer, soldier or sailor in the Army or Navy of the Queen, or attempts to seduce any such officer, soldier or sailor from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—In this section the words ‘officer’ and ‘soldier’ include any person subject to the Articles of War for the better government of Her Majesty’s Army, or to the Articles of War contained in Act No. V of 1869.

Abetting
mutiny, if
mutiny
committed
in conse-
quence.

132. Whoever abets the committing of mutiny by an officer, soldier or sailor in the Army or Navy of the Queen, shall, if mutiny be committed in consequence of that abetment¹, be punished with death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetting
assault by
soldier or
sailor on
superior
officer.

133. Whoever abets an assault² by an officer, soldier or sailor in the Army or Navy of the Queen, on any superior officer³ being in the execution of his office⁴, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Abetting
such as-
sault, if

134. Whoever abets an assault by an officer, soldier or sailor in the Army or Navy of the Queen, on any superior

¹ See sec. 109, expl.

² See sec. 351.

³ Commissioned or non-commissioned: the section does not apply to such assaults as one private may commit on another.

⁴ An officer is ‘in the execution of his office’ not only when he is performing a prescribed duty, but also when he is discharging a duty arising out of the exigency of the moment, M. & M. 114.

officer¹ being in the execution of his office², shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

135. Whoever abets the desertion³ of any officer, soldier or sailor in the Army or Navy of the Queen, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

136. Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier or sailor in the Army or Navy of the Queen has deserted, harbours such officer, soldier or sailor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

137. The master or person in charge of a merchant vessel, on board of which any deserter from the Army or Navy of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment, but for some neglect of his duty⁴ as such master or person in charge, or but for some want of discipline⁵ on board of the vessel.

138. Whoever abets what he knows to be an act of insubordination⁵ by an officer, soldier, or sailor in the Army or Navy of the Queen, shall, if such act of insubordination⁵ be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

139. No person subject to any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy, is subject to punishment under this Code for any of the offences defined in this chapter.

¹ See note 3, p. 140.

² See note 4, p. 140.

³ i.e. unlawful absence from duty without intention of returning to it. The section does not apply to mere

absence without leave.

⁴ These vague expressions have not yet been construed by the Courts.

⁵ This probably means a wilful breach of discipline.

assault committed.

Abetting desertion.

Harbouring deserter.

Deserter concealed on board merchant vessel.

Abetting insubordination of soldier or sailor.

Persons subject to Articles of War not punishable under this chapter.

Wearing
soldier's
dress.

140. Whoever, not being a soldier in the Military or Naval service of the Queen, wears any garb, or carries any token resembling any garb or token used by such a soldier, with the intention¹ that it may be believed that he is such a soldier, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both².

¹ Whether innocent or fraudulent.

² Chap. VI does not deal with the offence of purchasing regimental necessities, as to which see Act VII

of 1867, Mad. Reg. XIV of 1832, sec. 2, Bom. Reg. XXII of 1827, sec. 19, and 44 & 45 Vic. c. 58, sec. 156.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

141. An assembly of five or more persons is designated an Unlawful 'unlawful assembly,' if the common object of the persons ^{assembly defined.} composing that assembly is—

First.—To overawe by criminal force¹, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency², or any Lieutenant-Governor, or any public servant³ in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief⁴ or criminal trespass⁵, or other offence⁶; or

Fourth.—By means of criminal force¹, or show of criminal force, to any person, to take or obtain possession of any property⁷, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right⁸ of which he is in possession or enjoyment, or to enforce any right or supposed right⁹; or

Fifth.—By means of criminal force¹, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do¹⁰.

¹ Sec. 350. The force referred to in the first clause is, according to Mr. Mayne, to be employed at some indefinite future period.

² Sec. 18.

³ Sec. 21.

⁴ Sec. 425.

⁵ Sec. 441.

⁶ This includes, not only offences under the Code, but offences punishable under a special or local law with imprisonment for six months or upwards (sec. 40).

⁷ Whether moveable or immovable.

⁸ i. e. any other easement or right to an advantage arising from situation; see Act V of 1882, sec. 7.

⁹ 5 Mad. H. C. Rulings, vi. This clause applies whether the possession is sought with or without colour of title. The object is to prevent breaches of the peace.

¹⁰ 4 Mad. H. C. Rulings, lxxv: 5 Mad. H. C., Appx. vi: 7 *ibid.* xxxv. As for instance, to compel one to sow or not to sow his land with a particular crop, to prevent a religious procession, to deter a Hindu widow from remarrying.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly ¹.

Joining
unlawful
assembly.

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Punish-
ment.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Being
member of
unlawful
assembly
armed with
deadly
weapon.

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence ², is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining
unlawful
assembly,
after com-
mand to
disperse.

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law ³ to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Force used
by one
member in
prosecu-
tion of
common
object.

146. Whenever force or violence is used ⁴ by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly ⁵, every member of such assembly is guilty of the offence of rioting.

Punish-
ment for
rioting.

147. Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Rioting,
armed with
deadly
weapon.

148. Whoever is guilty of rioting, being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with

¹ A meeting for deliberation only and to arrange plans for future action does not seem covered by this definition. There must be some present and immediate purpose of carrying into effect the common object, M. & M. 120.

² i. e. a weapon which under present circumstances and during the

existence of the assembly is an offensive weapon, M. & M. 123.

³ See Cr. P. C. (Act X of 1882), Chap. IX.

⁴ The expression 'force is used' must apparently be construed without reference to the explanation in s. 349, M. & M. 129.

⁵ 5 N. W. P. 208.

imprisonment of either description for a term which may extend to three years, or with fine, or with both ¹.

149. If an offence ² is committed by any member of an Offence unlawful assembly in prosecution of the common object of committed in prosecution of that assembly, or such as the members of that assembly knew of common object to be likely to be committed in prosecution of that object ³, every person who, at the time of the committing of that offence ⁴, is a member of the same assembly, is guilty of that offence ⁵.

150. Whoever hires, or engages or employs, or promotes Hiring or connives at the hiring, engagement, or employment of any persons to join or become a member of any unlawful assembly, join unlawful shall be punishable as a member of such unlawful assembly, assembly. and for any offence which may be committed by any such person as a member of such unlawful assembly, in pursuance of such hiring, engagement, or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence ⁶.

151. Whoever knowingly joins or continues in any assembly Joining of five or more persons likely to cause a disturbance of the assembly of five or more after public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either command to disperse. description for a term which may extend to six months, or with fine, or with both.

¹ Persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting armed with deadly weapons (s. 148), culpable homicide (s. 304), and grievous hurt (s. 326), 3 N. W. P. 174, dissenting from 7 Suth. Cr. 13.

² Here and in the subsequent part of this chapter 'offence' means only 'a thing made punishable by this Code' (s. 40).

³ 4 Ben. Appendix 47 (S. C. 13 Suth. Cr. 33).

⁴ 3 Ben. App. Cr. 1.

⁵ The meaning of this section seems to be: When an offence is committed by any member of an unlawful assembly with a view to accomplish its common object; or when an offence such as the members of an unlawful assembly knew to be likely to be committed during the prosecution of

that object is committed by any member of that assembly; every person who at the time of committing either of such offences is a member of the assembly is guilty of that offence; see 11 Ben. 347, and compare sec. 460. In 7 Suth. Cr. 60, col. 1, Norman J. thought that sec. 149 might be read as a proviso to sec. 148. When a man is constructively guilty of murder under sec. 34, Field J. doubted whether he could be said to have committed murder within the meaning of sec. 149, so as to render other persons, by a double construction, guilty of murder, 8 Cal. 739.

⁶ This section is intended to 'embrace all who promote or connive at the employment of *lathiyals* (bludgeon-men), and render them punishable as principals,' Progs. of Legislative Council, 1860, col. 1082.

Explanation.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

Assaulting
or obstruct-
ing public
servant
when sup-
pressing
riot, &c.

152. Whoever assaults ¹ or threatens to assault, or obstructs or attempts to obstruct, any public servant ² in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray ³, or uses, or threatens or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ⁴.

Giving pro-
vocation
with intent
to cause
riot.

153. Whoever maliciously or wantonly, by doing anything which is illegal ⁵, gives provocation to any person, intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Liability of
owner of
land on
which un-
lawful
assembly is
held.

154. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held or such riot is committed, and any person having or claiming an interest in such land ⁶, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest Police station, and do not, in the case of his or their having reason

¹ Sec. 351.

² Sec. 21.

³ See the Cr. P. Code, ss. 127-132.

⁴ Knowledge of the fact that the person assaulted etc. is a public servant is, no doubt, an essential part of an offence under this section, M. & M. 127.

⁵ Sec. 43.

⁶ 'An interest in land' means any fragment of the ownership. The section would therefore apply to tenants and mortgagees, remaindermen and reversioners; but not to one merely entitled to a charge on land or to an easement.

to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly¹.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land², or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine³, if he or his agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place and for suppressing and dispersing the same¹.

Liability of landowner for whose benefit riot committed.

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, the agent or manager of such person shall be punishable with fine³, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same⁴.

Liability of his agent.

157. Whoever harbours, receives, or assembles in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or

Harbouring persons hired for unlawful assembly.

¹ 6 Ben. Appendix, 84: 3 Suth. Cr. 54, col. 2. An absent and non-resident owner may be made liable under this section for the misconduct of his local agents, M. & M. 129.

² See note 6, p. 146.

³ The amount is unlimited; but see sec. 63.

⁴ 10 Cal. 338, where it was stated that these sections were intended to put a stop to riots committed or abetted by managers of indigo-factories.

employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Being
hired to
take part
in unlawful
assembly
or riot.

158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both; and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Affray
defined.

159. When two or more persons, by fighting¹, in a public place, disturb the public peace, they are said to 'commit an affray.'

Punish-
ment for
com-
mitting
affray.

160. Whoever commits an affray shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

¹ There must be actual fighting. Mere quarrelsome words or gestures, or preparations made for fighting, do not constitute an affray, M. & M. 133.

And the fighting must be in a public place. A quarrel among several persons in a private room only amounts to an assault by each.

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

161. Whoever, being or expecting to be a public servant¹, ^{Taking bribe in respect of official act.} accepts or obtains, or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification whatever, other than legal remuneration², as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency³, or with any Lieutenant-Governor, or with any public servant⁴, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both⁵.

Explanations.—‘Expecting to be a public servant.’ If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

‘Gratification.’ The word ‘gratification’ is not restricted to pecuniary gratifications, or to gratifications estimable in money.

‘Legal remuneration.’ The words ‘legal remuneration’ are not restricted to remuneration which a public servant can

¹ Sec. 21. This includes a railway-servant, Act IV of 1879, sec. 27, and a telegraph-officer, Act XIII of 1885, sec. 31. A patwari taking grain as a consideration for showing favour to the giver in the discharge of his functions as patwari should be convicted under sec. 161, not sec. 165, 2 N. W. P. 148.

² i. e. what is given to him by, or

by the authority of, the Government which he serves, and what is accepted by him, with its permission, from any person, M. & M. 135.

³ Sec. 18.

⁴ Sec. 21.

⁵ Asking for a bribe, by implication or expressly, is an attempt to obtain one, 2 All. 253, 259.

lawfully demand, but include all remuneration which he is permitted by the Government¹ which he serves to accept.

‘A motive or reward for doing.’ A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations.

(a) *A*, a munsif, obtains from *Z*, a banker, a situation in *Z*’s bank for *A*’s brother, as a reward to *A* for deciding a cause in favour of *Z*. *A* has committed the offence defined in this section.

(b) *A*, holding the office of Resident at the Court of a subsidiary power, accepts a lākḥ of rupees from the Minister of that power. It does not appear that *A* accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that power with the British Government. But it does appear that *A* accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that power. *A* has committed the offence defined in this section.

(c) *A*, a public servant, induces *Z* erroneously to believe that *A*’s influence with the Government has obtained a title for *Z*, and thus induces *Z* to give *A* money as a reward for this service. *A* has committed the offence defined in this section².

Taking
gratification to in-
fluence
public ser-
vant.

162. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant³ to do or to forbear to do any official act, or in the exercise of the official functions of such public servant³ to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency⁴, or with any Lieutenant-Governor, or with any public servant³, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

¹ This includes (for the purposes of sec. 161) any employer of a railway servant as such, Act IV of 1879, sec. 27, and any person licensed under the Telegraph Act, XIII of 1885, sec. 31.

² *A*, a constable, and *B*, a chaukidār, enter a house in which certain baniyas are gambling, arrest them, and afterwards release them on payment of a

sum of Rs. 15. *A* has committed the offence defined in this section, and *B* has abetted that offence, 5 Suth. Cr. 49, col. 2.

³ Sec. 21. This includes a railway servant, Act IV of 1876, sec. 27, and a telegraph-officer, Act XIII of 1885, sec. 31.

⁴ Sec. 18.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant¹ to do or to forbear to do any official act, or in the exercise of the official functions of such public servant¹ to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant¹, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Taking gratification for exercise of personal influence with public servant.

Illustrations.

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

164. Whoever, being a public servant¹, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Abetment by public servant of offences above defined.

Illustration.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

165. Whoever, being a public servant¹, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing², without consideration, or for a consideration which he knows to be inadequate³, from

Public servant obtaining gift from person concerned in

¹ See note 3, p. 150.

² e.g. a rupee, 1 Al. 530.

³ This section does not prohibit a sale or purchase by a public servant, at a fair price, to or from a person

transacting business before him. As to the incapacity of officers connected with courts to buy actionable claims, see the Transfer of Property Act, IV of 1882, sec. 136.

proceeding
by such
public ser-
vant.

any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant¹, or having any connection with the official functions of himself or of any public servant¹ to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Illustrations.

(a) *A*, a Collector, hires a house of *Z*, who has a settlement case pending before him. It is agreed that *A* shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, *A* would be required to pay two hundred rupees a month. *A* has obtained a valuable thing from *Z* without adequate consideration.

(b) *A*, a Judge, buys of *Z*, who has a cause pending in *A*'s Court, Government Promissory Notes at a discount, when they are selling in the market at a premium. *A* has obtained a valuable thing from *Z* without adequate consideration.

(c) *Z*'s brother is apprehended and taken before *A*, a Magistrate, on a charge of perjury. *A* sells to *Z* shares in a bank at a premium, when they are selling in the market at a discount. *Z* pays *A* for the shares accordingly. The money so obtained by *A* is a valuable thing obtained by him without adequate consideration.

Public ser-
vant dis-
obeying
law, with
intent to
cause in-
jury.

166. Whoever, being a public servant, knowingly disobeys any direction of the law² as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury³ to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in *Z*'s favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to *Z*. *A* has committed the offence defined in this section.

¹ See note 3, p. 150.

² Whether the direction is given by a written law, or whether it is a mandate proceeding from a competent authority which the public servant is bound by law to obey—as a writ or order for the liberation of a person

from prison, *M. & M.* 139. As to breaking rules for preventing disclosures of the contents of documents delivered under the Income-tax Act, see Act II of 1886, sec. 38.

³ Sec. 44.

167. Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause, or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ¹.

Public servant framing incorrect document with intent to injure.

168. Whoever, being a public servant, and being legally bound ² as such public servant not to engage in trade ³, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant unlawfully engaging in trade.

169. Whoever, being a public servant, and being legally bound ², as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated ⁴.

Public servant unlawfully buying or bidding for property.

170. Whoever pretends to hold any particular office ⁵ as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office ⁶, shall be punished with imprisonment of

Personating public servant.

¹ As to the liabilities of a translator who gives a false translation, see also sec. 191, illus. (e).

² Sec. 43.

³ To habitually buy and sell with a view to profit, M. & M. 141. The section is intended for officials like the Governor-General, Governors, Members of Council, and Judges of High Courts, 33 Geo. III, c. 52, s. 137: the Administrator-General, Act II of 1874, sec. 10: officers of the High Courts, Act XV of 1848, sec. 1: judges and officers of Presidency Small Cause Courts, Act XV of 1882, sec. 15: forest-officers, Act VII of 1878, sec. 74: police-officers, Acts V of 1861, sec. 10, and XXIV of 1859, sec. 19; Bom. Act VII of 1867, sec. 11: revenue-officers, Mad.

Regs. I of 1803, sec. 40, and II of 1803, sec. 64; Bom. Act V of 1879, sec. 31; Ben. Reg. II of 1793, sec. 18; and see 33 Geo. III, c. 52, sec. 137.

⁴ A conviction under this section and also under a special law (e.g. Act I of 1871, sec. 27), in respect of one and the same offence, is illegal, 5 N. W. P. 49.

⁵ It must be an existing office. If it is uncertain who legally fills an office, a person doing an official act in pursuance of what he honestly believes to be his lawful title to the office does not come within this section, M. & M. 142.

⁶ An act is done under colour of an office if it is an act having some relation to the office which the actor pretends to hold. If it has no relation to the office—as if A, pretending to be

either description for a term which may extend to two years, or with fine, or with both.

Wearing
garb re-
sembling
one used
by public
servant.

171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both¹.

a servant of Government, travelling through a district, obtains money, provisions, etc., the offence may amount to cheating under sec. 415, but is not punishable under sec. 170, M. & M. 142.

¹ The offence is complete though no act is done or attempted in the assumed official character, M. & M. 143, and, apparently, though the garb is worn, or token carried, without any dishonest intention.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS¹.

172. Whoever absconds² in order to avoid being served with a summons, notice, or order³ proceeding from⁴ any public servant, legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice or order is to attend in person or by agent, or to produce a document in a Court of Justice⁵, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

173. Whoever in any manner intentionally⁶ prevents the serving⁷ on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, or intentionally prevents the lawful affixing to any place of any such summons, notice or order, or intentionally⁸ removes any such summons, notice or order from any place to which it is lawfully affixed, or intentionally prevents

Abscond-
ing to
avoid ser-
vice of
summons.

Preventing
service
or publica-
tion of
summons.

¹ See definition of 'public servant,' sec. 21. No Court can take cognizance of any offence punishable under secs. 172-188, except with the previous sanction or on the complaint of the public servant concerned, or of some public servant to whom he is subordinate, Cr. P. C. sec. 195, cl. (a).

² i. e. conceals himself. This does not necessarily imply that a person leaves the place in which he is. If one, having concealed himself before process issues, continues to do so after it has issued, he 'absconds,' 4 Mad. 397.

³ These words do not include a warrant addressed to a police-officer to arrest an offender and bring him before a magistrate, 5 Suth. Cr. 71, or to a Nazir by a civil court for

the arrest of a defendant in execution of a decree, 4 N. W. P. 97.

⁴ The absconding must be with a purpose. This implies that the accused knows, or has reason to believe, that the process has issued. Absconding to avoid the issue of process is not punishable.

⁵ Sec. 20.

⁶ If it be once proved that the accused actually prevented or interfered with the service, it lies on him to show that he did so without wrong intention, M. & M. 145.

⁷ Mere refusal to receive, or give a receipt for, a summons is not an offence under this section, 5 Mad. 199; 5 Bom. H. C., Cr. Ca. 34; followed in 3 Cal. 621.

the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Non-attendance in obedience to order from public servant.

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time¹ in obedience to a summons, notice, order² or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same³, intentionally⁴ omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice⁵, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁶.

Illustrations.

(a) *A*, being legally bound to appear before the Supreme Court at Calcutta, in obedience to a subpoena issuing from that Court, intentionally omits to appear. *A* has committed the offence defined in this section.

(b) *A*, being legally bound to appear before a Zila Judge, as a witness, in obedience to a summons issued by that Zila Judge, intentionally omits to appear. *A* has committed the offence defined in this section.

Omission to produce document

175. Whoever, being legally bound⁷ to produce or deliver up any document to any public servant⁸, as such, intentionally

¹ i. e. day and hour, 5 All. 8.

² This may be verbal, 5 Mad. H. C. Rulings, xv.

³ 5 Mad. 377: 8 Bom. H. C., Cr. Ca. 49: 5 ibid. 33.

⁴ It must be proved that the non-attendance was in the nature of a wilful disobedience, 1 N. W. P. 303.

⁵ Sec. 20.

⁶ 1 Ben. App. Cr. 1. This section does not apply to an escape from custody under a warrant in execution of the decree of a Civil Court, 1 Bom. H. C. 38.

⁷ Sec. 43. See the Income-tax Act, II of 1886, sec. 45.

⁸ Sec. 21.

omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both ¹.

Illustration.

A, being legally bound to produce a document before a Zila Court, intentionally omits to produce the same. A has committed the offence defined in this section.

176. Whoever, being legally bound ² to give any notice or to furnish information on any subject to any public servant ³, as such ⁴, intentionally omits ⁵ to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the notice or information required to be given respects the commission of an offence ⁶, or is required for the purpose of preventing the commission of an offence ⁶, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both ⁷.

to public servant.

Omission to give notice or information to public servant.

177. Whoever, being legally bound ⁸ to furnish information on any subject to any public servant ³, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; or, if

Furnishing false information.

¹ As to the procedure where this offence is committed in the view or presence of a Court or Registration-officer, see Cr. P. C. secs. 480, 483.

² See note 7, p. 156.

³ Sec. 21.

⁴ See, for instance, the Cr. P. C. sec. 45; and as to the evidence necessary to support a conviction of a person falling within that section, see II Cal. 619.

⁵ A person's mere refusal to join a dacoity which is afterwards committed,

does not imply a knowledge on his part of the commission or render him liable to punishment for intentional omission, etc., 7 Suth. Cr. 29, col. 2.

⁶ Sec. 40.

⁷ A person legally bound to give information of a certain fact to the police should not be prosecuted for omitting to do so when the police are already aware of the fact, 4 Cal. 623; followed in 7 Mad. 438.

⁸ 4 Mad. 144. See Act II of 1886, sec. 45.

the information which he is legally bound to give respects the commission of an offence¹, or is required for the purpose of preventing the commission of an offence¹, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both².

Illustrations.

(a) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the District that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(b) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound, under clause 5, section VII, Regulation III, 1821, of the Bengal Code³, to give early and punctual information of the above fact to the officer of the nearest Police station, wilfully misinforms the Police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in this section⁴.

Refusing
oath duly
required.

178. Whoever refuses to bind himself by an oath⁵ or affirmation to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself⁶, shall be punished with simple imprisonment

¹ Sec. 40, cl. 3.

² This section applies to false statements in the declarations mentioned in the Income-tax Act II of 1886, sec. 18 (2).

³ Repealed by Act XVII of 1862.

⁴ Z gives A four annas with which to buy a stamp for him, and when the stamp-vendor asks A his name, A gives the name of Z. Here A is guilty of the offence defined in this section, 3 Bom. H. C., Cr. Ca. 43. So where A, an officer in the Salt Revenue Department, makes a false entry in his diary, which he keeps and sends to his official superior, 4 Mad. 144.

⁵ Sec. 51. See Act X of 1873, sec. 15.

⁶ Whether in a judicial or any other proceeding. A public servant seems 'legally competent to require' that a person shall bind himself by oath or affirmation, when the public servant, being authorised to administer oaths

and affirmation, has to deal with a person by whom an oath or affirmation must then be made. Public servants authorised to administer oaths are judges and persons having by law or consent of parties authority to receive evidence (Act X of 1873, sec. 4); commanding officers of military stations occupied by the Queen's troops (*ibid.*); collectors in resumption-proceedings (Ben. Reg. II of 1819, secs. 9, 19); conciliators (Act XVII of 1879, sec. 42); detaining-officers (Act VII of 1880, sec. 11 (d)); managers of encumbered estates, Oudh (Act XXIV of 1870, sec. 15); registering officers (Act III of 1877, sec. 63); salt-officers (Bom. Act VII of 1873, sec. 60); Secretaries of Government savings-banks (Act V of 1873, sec. 7); settlement-officers (Ben. Reg. VII of 1822, sec. 19); village-Munsifs (Mad. Reg. IV of 1816, secs. 12, 15); village-pancháyats (Mad. Reg. V of 1816, sec. 4 (11)). Persons

for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both ¹.

179. Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant, in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Refusing to answer public servant.

180. Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both ².

Refusing to sign statement.

181. Whoever, being legally bound by an oath ³ or affirmation to state the truth on any subject to any public servant or other person authorised by law to administer such oath, makes to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ⁴.

False statement on oath to public servant.

182. Whoever gives to any public servant any information ⁵

False information,

bound to make oaths or affirmations are—jurors; witnesses; interpreters of questions put to, and evidence given by, witnesses (Act X of 1873, sec. 5); karnams (Mad. Reg. XXIX of 1802, sec. 17); serving-officers (Act XIV of 1882, sec. 82); parties to marriage (Act XV of 1872, secs. 42, 66).

¹ As to the procedure where this offence is committed in the view or presence of a Court or Registration officer, see Cr. P. C. ss. 480, 483.

² An accused person who refuses to sign a confession (Cr. P. C. sec. 164) or a statement made at his trial in answer to questions put by the Court (Cr. P. C. sec. 364) commits no offence under this section, 4 Bom. 15.

³ See note 6, p. 158.

⁴ A conviction under this section is good, though the offence falls within sec. 193; see 4 Mad. H. C. Rulings, xviii. But a sentence under sec. 181 which awards a fine, but no imprisonment, is illegal, *ibid.* The offence under sec. 181 is apparently included in the latter clause of sec. 193. As to the procedure when this offence is committed in the view or presence of a Court or Registration officer, see Cr. P. C. secs. 480, 483.

⁵ Mere expression of a private person's belief that certain zamindars had usurped possession of a market belonging to the State, is not 'information,' 4 All. 498. Nor are statements made by a prisoner to a magistrate, for the purpose of his defence, 2 N. W. P. 128.

with intent to cause public servant to injure. which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant to use the lawful power¹ of such public servant to the injury² or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both³.

Illustrations.

(a) A informs a Magistrate that Z, a Police officer subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

Resistance to taking of property by lawful authority.

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁴.

Obstructing sale of

184. Whoever intentionally obstructs⁵ any sale of property

¹ These words refer to some power to be exercised by the public servant misinformed, which shall tend to some direct and immediate prejudice of the person against whom the information is levelled. Sec. 182 does not apply to a case where the public servant is only competent to pass, and passes, on the information, 4 Mad. 241.

² Sec. 44.

³ 8 Suth. Cr. 67; 7 Bom. 185. Offences under this section are included under sec. 211. The Allahabad High Court holds that the application of sect. 182, and the institution of prosecutions for offences under it, are limited to the public servant against whom the offence has been committed, or to his official superior, and that it was not intended

that these provisions should be enforced at the instance of private persons, 5 All. 39; 3 N. W. P. 194. But the Calcutta High Court has held, in a series of cases (9 Suth. Cr. 31; 11 ib. 22; 19 ib. 33, col. 2; 4 Cal. 869; 5 Cal. 184) that the person injured by the false information may prosecute if he has obtained the necessary sanction; and this view is supported by the Cr. P. C. sec. 195.

⁴ As to the right of private defence of property, see secs. 97, 99.

⁵ Notices given at public sales, by persons having, or claiming in good faith to have, an interest in the property, would not be deemed obstructions: otherwise, if they were clearly not *bond fide* and merely for the purpose of injuring the sale, M. & M. 152.

offered for sale by the lawful authority of any public servant as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

property offered for sale by public servant.

185. Whoever, at any sale of property held by the lawful authority of a public servant as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both¹.

Illegal purchase of property offered for sale by public servant.

186. Whoever voluntarily² obstructs any public servant³ in the discharge of his public functions⁴ shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both⁵.

Obstructing public servant.

187. Whoever, being bound by law⁶ to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two

Omission to assist public servant.

¹ It has been held that *A* committed an offence under this section when he bid for the lease of a ferry sold at public auction by the magistrate, and the lease was knocked down to him, and he then omitted to complete the sale, in the hope that the lease would be resold and that he would then obtain it at a lower price, 3 *Suth. Cr.* 33. It may be assumed, though it does not appear in the report, that, at the time of bidding, *A* did not intend to perform his obligations.

² Sec. 39.

³ Sec. 21, e.g. a process-server, 2 *Ben. F. B. R.* 22.

⁴ Refusal of *A* to accompany a measuring clerk employed in the Revenue Survey Department to *A*'s house, and permit it to be measured,

is not an offence under this section, 5 *Bom. H. C., Cr. Ca.* 51; nor is the refusal of a cart-owner to give his cart on hire to a Government officer who applied for it, 9 *Bom. H. C.* 165; nor is the obstruction by *A* of a bailiff who breaks the doors of *A*'s house in order to execute a decree against *B*, neither *B*, nor any goods of his, being in the house, 7 *Bom. H. C., Cr. Ca.* 83; nor is an escape from the custody of a police-peon, 2 *Bom. H. C.* 134; 6 *ib. Cr. Ca.* 27.

⁵ As to threatening a public servant, see sec. 189; insulting or interrupting him in a judicial proceeding, sec. 228; assaulting or causing hurt to him in the discharge of his duty, secs. 152, 332, 333, 353.

⁶ See, for instance, *Cr. P. C. sec.* 42, 3 *All.* 201.

hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence¹, or of suppressing a riot or affray², or of apprehending a person charged with or guilty of an offence¹, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Disobedi-
ence to
order duly
promul-
gated by
public
servant.

188. Whoever, knowing that by an order promulgated by a public servant³ lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed⁴, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or affray², shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce harm.

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the

¹ Sec. 40, cl. 2.

² Sec. 159.

³ This applies to orders made by public functionaries for public purposes (as, for instance, under the Cr.

P. C. sec. 144), not to orders such as injunctions, made in civil suits between party and party, 6 Cal. 445.

⁴ 3 Ben. Appendix 150: 4 Mad. H. C. Rulings, vi.

order, and thereby causes danger of riot. A has committed the offence defined in this section¹.

189. Whoever holds out any threat of injury² to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

190. Whoever holds out any threat of injury³ to any person for the purpose of inducing that person to refrain or desist from making a legal application, for protection against any injury, to any public servant legally empowered as such to give such protection or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

¹ Where a sub-collector ordered A to refrain from cultivating village-waste-land and A knowingly disobeyed the order, the High Court held him guilty of criminal trespass, 5 Mad. H. C. Rulings, xvii; in other words, that he entered on the land

with the intent to commit an offence under sec. 188. If this ruling be right, it must be supposed that A's disobedience produced, or was likely to produce, harm.

² Sec. 44.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE ¹.

Giving
false evi-
dence.

191. Whoever being legally bound by an oath ², or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false ³, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence ⁴.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

¹ No Court can take cognizance of any offence punishable under secs. 193-196, 199, 200, 205-211, or 228, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate, Cr. P. C. sec. 195, cl. (b).

² A Hindu converted to Christianity is not under a legal obligation to speak the truth, unless his evidence be given under the sanction of an oath on the gospels, 4 Mad. H. C. 185.

³ A person is not punishable under the Code if what he states is true in fact, notwithstanding that he may have no knowledge or belief on the subject when he makes the statement, M. & M. 161; but see ill. (d) to this section.

⁴ To establish this offence direct

proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement, and the contradictory statement of the person charged, though not made on oath, 6 Mad. H. C. 343. To constitute an offence under this section it is not necessary that the false evidence should be material to the case in which it is given. See 1 Mad. H. C. 38; 5 Bom. H. C., Cr. Ca. 68. (Otherwise under sec. 192.) Nor is it necessary to prove a *corrupt* intention. It is enough to prove intention, and if the statement was false and known by the accused to be false, it may be presumed that in making that statement he *intentionally* gave false evidence, 3 N. W. F. 133, 134, per Turner J.

Illustrations.

(a) *A*, in support of a just claim which *B* has against *Z* for one thousand rupees, falsely swears on a trial that he heard *Z* admit the justice of *B*'s claim. *A* has given false evidence.

(b) *A*, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of *Z*, when he does not believe it to be the handwriting of *Z*. Here *A* states that which he knows to be false, and therefore gives false evidence.

(c) *A*, knowing the general character of *Z*'s handwriting, states that he believes a certain signature to be the handwriting of *Z*; *A* in good faith believing it to be so. Here *A*'s statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of *Z*, *A* has not given false evidence.

(d) *A*, being bound by an oath to state the truth, states that he knows that *Z* was at a particular place on a particular day, not knowing anything upon the subject. *A* gives false evidence whether *Z* was at that place on the day named, or not¹.

(e) *A*, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly that which is not and which he does not believe to be a true interpretation or translation. *A* has given false evidence.

192. Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending² that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such³, or before an arbitrator, and that such circumstances, false entry, or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said 'to fabricate false evidence'⁴.

Fabricating false evidence.

Illustrations.

(a) *A* puts jewels into a box belonging to *Z*, with the intention that they may be found in that box, and that this circumstance

¹ Here *A* has made a false statement concerning his knowledge.

² at the time of causing or making, 7 Mad. 290.

³ e.g. altering the date of a document for the purpose of getting it registered, 6 Cal. 482.

⁴ The prosecution must prove that it was intended that the false circum-

stance should appear as part of the evidence on which the judicial officer has to form his judgment, and that the circumstance was such as might have caused him to entertain an erroneous opinion on some material point in the case, 5 Mad. H. C. 374. As to corrections of mistakes in documents, see 5 All. 220.

may cause *Z* to be convicted of theft. *A* has fabricated false evidence.

(b) *A* makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. *A* has fabricated false evidence¹.

(c) *A*, with the intention of causing *Z* to be convicted of a criminal conspiracy, writes a letter in imitation of *Z*'s handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. *A* has fabricated false evidence.

Punish-
ment for
false evi-
dence.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding², or fabricates false evidence³ for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine⁴.

Explanation 1.—A trial before a Court Martial or before a Military Court of Request⁵ is a judicial proceeding.

¹ But where a document was entrusted to a police officer to be forwarded to his superior, and the police officer suppressed it and made a false entry in his official diary that the document had been so forwarded, intending that if he were prosecuted under the Police Act for the suppression the entry might be used as evidence *in his behalf*, Straight Off. C. J. held that he could not be convicted under this section because the entry could not have been so used, and said that the words 'so appearing in evidence' obviously assumed the admissibility of the false entry or statement, 6 All. 44. This seems doubtful. See *Reg. v. Gibbons*, 31 L. J. M. C. 98.

² 'Stage of a judicial proceeding' includes an investigation directed by law preliminary to a proceeding before a Court of Justice (4 N. W. P. 6), e.g. the examination of a complainant in reference to the matter of his petition. It also includes a proceeding under sec. 12 or chap. iv. of the Income Tax Act, II of 1886. Whoever makes two contradictory statements in the course of a judicial

proceeding may be tried and convicted of giving false evidence, on a single charge, if there is evidence to show which statement is false, 5 Bom. H. C., Cr. Ca. 49.

³ Sec. 192: 2 All. 105.

⁴ And see the Whipping Act, sec. 4. It must be proved that the accused intentionally made a particular statement which is shown to have been false to his knowledge, 7 Ben. Appx. 68. As to the form of charge under this section, *ibid.* 66, 67, and 1 Ben. App. Cr. 13. The charge should of course state exactly what is the false evidence imputed. Thus, a charge 'that *A. B.* on or about the 15th of April 1881 gave false evidence' is not sufficiently specific, 3 N. W. P. 314. The charge should also state in what respect the imputed evidence is false, 8 Suth. Cr. 95.

Making a false return of service of summons on a person named as a witness is an offence under sec. 193, not sec. 181, 8 Suth. Cr. 27.

As to the procedure of the Civil Court in case of an offence under sec. 193, see Civ. P. C. sec. 643.

⁵ Whether European (44 & 45 Vic.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence¹.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence².

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by this Code³ or the law of England⁴, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described⁵.

Giving false evidence with intent to procure conviction of capital offence.

195. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will

Giving false evidence with

c. 58, secs. 148–150) or Native (Acts XI of 1841, XII of 1842).

¹ In an enquiry held by an Assistant Magistrate merely in order to ascertain the writer of an anonymous letter to him charging certain persons with murder, A makes a false statement. As this enquiry is not a stage of a judicial proceeding, A has not given false evidence, 5 *Suth. Cr.* 72, col. 2.

² *Sec.* 192: 2 *All.* 105.

³ Or by any special or local law, sec. 40, cl. 2.

⁴ High treason, murder, piracy with violence. The words 'or the law of England' were inserted in secs. 194 and 195 (by Act XXVII of 1870, sec. 7) because of the difficulty created by the words 'by any law passed by the Governor-General of India in Council' in sec. 3.

⁵ And see the Whipping Act, sec. 4.

intent to procure conviction of offence punishable with transportation or imprisonment.

thereby cause any person to be convicted of an offence which by this Code¹ or the law of England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished².

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment, with or without fine.

Using evidence known to be false.

196. Whoever corruptly³ uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated⁴, shall be punished in the same manner as if he gave or fabricated false evidence⁵.

Issuing or signing false certificate.

197. Whoever issues⁶ or signs any certificate⁷ required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true certificate

198. Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false

¹ See note 3, p. 167.

² And see the Whipping Act, sec. 4, *supra*, p. 106. When A burnt down his own house and then falsely charged Z with an offence under sec. 436, here, as the first offence is committed in furtherance of the second, A should be charged under sec. 211, not sec. 195; 8 *Suth. Cr.* 65, col. 1.

³ This word seems here used to denote that advocates and vakils whose duty it is, not to judge of the credibility of evidence, but to submit it for the consideration of judges etc. on behalf of their clients, do not incur the penalties for using false evidence, M. & M. 164. But see *supra*, p. 11.

⁴ 7 *Mad.* 289, where a conviction under this section was upheld; but, apparently, without adverting to the meaning of 'corruptly,' 5 *All.* 217, 220.

⁵ Where A dishonestly uses in a

civil suit a document which he knows to be forged, he should be charged under sec. 471, not under sec. 196.

As to the sanction or complaint necessary in case of prosecution for offences under secs. 193-196, and committed in, or in relation to, any proceeding in Court, see *Cr. P. C.* sec. 195, cl. (b). As to the procedure of the Civil Courts in case of an offence under sec. 196, see *Civ. P. C.* sec. 643.

⁶ Put forth for the purpose of being used, M. & M. 165.

⁷ As, for instance, of adjustment of decrees (*Civ. Pr. C.* sec. 258); authorising a judgment debtor to mortgage land ordered to be sold (*ibid.* sec. 305); that a case is fit for appeal to the Queen in Council (*ibid.* sec. 600); of administration (Act II of 1874, secs. 36, 37); of marriage (Act XV of 1872).

in any material point, shall be punished in the same manner as if he gave false evidence.

199. Whoever, in any declaration¹ made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact², makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material³ to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence⁴.

200. Whoever corruptly uses or attempts to use as true any such declaration knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence⁵.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

201. Whoever, knowing or having reason to believe that an offence⁶ has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment⁷, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable⁸ with

¹ i.e. 'any statement of fact in the form simply of a declaration, which . . . for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation; in short, a declaration receivable in lieu of personal testimony,' 4 Mad. H. C. 187.

² See, for instance, Civ. P. C. section 643, and Act III of 1872, section 21.

³ This provision as to proving materiality shows that section 199 has no reference to the examination of a witness in a judicial proceeding, 4 Mad. H. C. 187, 188.

⁴ As to the procedure of Civil Courts in case of offences under sec. 199, see Civ. P. C. sec. 643.

⁵ As to the sanction or complaint

necessary in case of prosecution for offences under secs. 199, 200, see Cr. P. C. sec. 195, cl. (b). As to the procedure of Civil Courts in case of an offence under sec. 200, see Civ. P. C. sec. 643.

⁶ Sec. 40, cl. 3.

⁷ It is not enough that the disappearance of evidence was likely to have the effect of screening the offender, 5 N. W. P. 186.

⁸ The meaning is, 'Whenever an offence has actually been committed, any person, other than the offender, knowing or having reason to believe that it has been committed, and intending to screen the offender from legal punishment (a) causes any evidence of the commission to disappear, or (b) gives any information respecting the offence which he knows

death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Illustration.

A, knowing that *B* has murdered *Z*, assists *B* to hide the body¹ with the intention of screening *B* from punishment. *A* is liable to imprisonment of either description for seven years, and also to fine².

Omission
to give
informa-
tion of
offence.

202. Whoever, knowing or having reason to believe that an offence³ has been committed, intentionally omits to give any information respecting that offence which is he legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Giving
false infor-
mation re-
specting
offence.

203. Whoever, knowing or having reason to believe that an offence⁴ has been committed, gives any information respecting that offence which he knows or believes to be false⁵, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁶.

or believes to be false, shall, if the offence is punishable, etc.; see 7 *Suth. Cr.* 52: 2 *All.* 714: 3 *All.* 279: 7 *All.* 749: 6 *Cal.* 789: 11 *Cal.* 619: 8 *Bom. H. C., Cr. Ca.* 129. When *A* is charged with giving false information respecting the murder of *Z* in order to screen the murderer, the prosecution should prove (1) that *Z* was murdered, (2) that *A* gave information respecting the offence, (3) that such information was false and known by him to be false, (4) that he then knew of the commission of the murder, and (5) that his intention

was to screen the murderer, 3 *Mad. H. C.* 251.

¹ We must suppose that the body bears marks of violence or contains poison.

² And see 6 *Suth. Cr.* 80, col. 2, where *A* through fear abstained from preventing the murder of *Z*, and afterwards helped the murderers to hide *Z*'s body.

³ *Sec.* 40, cl. 3.

⁴ *Sec.* 40, cl. 2.

⁵ His intention is immaterial, 1 *Suth. Cr.* 18, col. 2.

⁶ 20 *Suth. Cr.* 66.

204. Whoever secretes or destroys any document¹ which he may be lawfully compelled to produce as evidence² in a Court of Justice³, or in any proceeding lawfully held before a public servant⁴ as such⁵, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence² before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Destruction of document to prevent its production as evidence.

205. Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment⁶, or causes any process to be issued⁷, or becomes bail or security, or does any other act in any suit or criminal prosecution⁸, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both⁹.

False personation for purpose of proceeding in suit.

206. Whoever fraudulently¹⁰ removes, conceals, transfers¹¹ or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture, or in satisfaction of a fine,

Fraudulent removal of property to prevent its seizure.

¹ Sec. 20.

² whether material or not.

³ Sec. 21.

⁴ Sec. 29.

⁵ 3 Mad. 261, where a party to a suit snatched up a document which had been produced in evidence before an arbitrator and ran away with it, in order to prevent a witness referring to it. Whether the proceeding is of a civil or criminal nature, this section applies.

⁶ The words 'or confesses judgment' are obsolete, as warrants of attorney and cognovits executed and given after 14th July, 1865, are void, Act XXIV of 1865, sec. 5.

⁷ As, for example, where A personates B a creditor of C, and causes a summons in B's name to issue against C for the recovery of the debt due to B.

⁸ The words 'in any suit or criminal proceeding' apply not only to 'does any other act,' but also to the

words 'makes any admission . . . security.'

⁹ 8 Suth. Cr. 80, col. 2. The gist of the offence under this section is the feigning to be another known person. It is therefore not enough to prove the assumption of a fictitious name: it must also appear that the assumed name was used as a means of falsely representing some other individual, 4 Mad. H. C. 18, dissenting from *Reg. v. Bhitto Kahar*, 1 Ind. Jur. 123. Fraudulent gain or benefit to the offender is not an essential element of this offence, and a conviction may be upheld even when the personation is with the consent of the person personated, 1 Mad. H. C. 450.

¹⁰ Sec. 25. Sec. 206 applies though the person removing etc. the property is not its owner.

¹¹ See the Transfer of Property Act, *infra*, sec. 53.

under a sentence which has been pronounced or which he knows to be likely to be pronounced by a Court of Justice ¹ or other competent authority, or from being taken in execution of a decree or order which has been made or which he knows to be likely to be made by a Court of Justice ¹ in a civil suit ², shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ³.

Fraudulently claim to property to prevent its seizure.

207. Whoever fraudulently accepts, receives, or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ³.

Fraudulently suffering decree for sum not due.

208. Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person, or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ³.

Illustration.

A institutes a suit against *Z*. *Z*, knowing that *A* is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of *B*, who has no just claim against him, in order that *B*, either on his own account or for the benefit of *Z*, may share in the proceeds of any sale of *Z*'s property which may be made under *A*'s decree. *Z* has committed an offence under this section.

¹ Sec. 20.

² This includes a suit for rent brought before a Collector, 2 Ben.

Short Notes, iv. (S. C. 10 Suth. Cr. 467).

³ See Civ. P. C. sec. 643.

209. Whoever fraudulently or dishonestly, or with intent to Dishonest-
injure or annoy ¹ any person, makes in a Court of Justice any ly making
claim ² which he knows to be false, shall be punished with im- false claim
prisonment of either description for a term which may extend in Court.
to two years, and shall also be liable to fine.

210. Whoever fraudulently obtains a decree or order Fraudu-
against any person for a sum not due, or for a larger sum lently ob-
than is due, or for any property or interest in property to taining
which he is not entitled, or fraudulently causes a decree or decree for
order to be executed against any person after it has been satis- sum not
fied, or for anything in respect of which it has been satisfied, due.
or fraudulently suffers or permits any such act to be done in
his name, shall be punished with imprisonment of either
description for a term which may extend to two years, or with
fine, or with both ³.

211. Whoever, with intent to cause injury ⁴ to any person, Prosec-
institutes or causes to be instituted any criminal proceeding ⁵ tion or
against that person, false
or falsely charges any person with having committed an charge
offence ⁶, knowing ⁷ that there is no just or lawful ground for with
such proceeding or charge against that person ⁸, intent to
injure.

¹ See secs. 24, 25, 44.

² e.g. files a plaint, or claims property attached before judgment or taken in execution of a decree.

³ Secs. 206-210 might well be consolidated. As to the procedure in Civil Courts in case of offences under secs. 205-210, see Civ. P. C. sec. 643.

⁴ Sec. 44.

⁵ The false charge must have been made to a Court or officer having jurisdiction to investigate and send up for trial, 6 Cal. 620. It may be made to a police officer, 1 Mad. H. C. 30: 5 Suth. Cr. 32: 5 Cal. 282.

⁶ See sec. 40, cl. 2. A false charge of refusing to give a stamped receipt for money paid was held in 1863 not to be punishable under sec. 211 (1 Bom. H. C. 92). But now see the Stamp Act, I of 1879, sec. 64.

⁷ when the charge was made, 3 Bom. H. C., Cr. Ca. 16. The averment that the accused knew that there were no just or lawful grounds for

the charge instituted is most material, 3 N. W. P. 327. It is not enough to show that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge upon evidence which is not sufficient to satisfy a reasonable mind, 6 Suth. Cr. 15.

⁸ Under this section 'instituting a criminal proceeding' may be treated as an offence in itself, apart from 'falsely charging' a person with having committed an offence, 8 Suth. Cr. 87, per Macpherson J. The section includes two distinct offences, viz., preferring a false charge, which may have no result, and actually instituting criminal proceedings. If no such proceedings are instituted, only imprisonment for two years, with or without fine, can be inflicted, however serious the offence may be which has been falsely charged, 5 All. 215, 216, per Mahmud J.

shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both¹;

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards², shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine³.

Harbour-
ing of-
fender.

212. Whenever an offence⁴ has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment⁵, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description

¹ The offence consists not in the prosecution of a false complaint, but in the making it, 1 All. 497, 527, following 1 Mad. H. C. 30, and see 4 N. W. P. 6.

² See above, p. 25.

³ 1 Bom. H. C. 34 (imprisonment with or without fine, but not fine alone): 7 Bom. 184. The fact that an offence alleged to have been committed has been compounded, is no conclusive answer to a charge made against the prosecutor under this section, 11 Cal. 79. The actual institution of criminal proceedings on a false charge is essential to the application of the latter part of this section, 5 All. 216, and if the offence of the accused stops at making a false charge, his case falls under the first part of the section irrespective of the fact that the charge relates to 'an offence punishable with death, transportation for life, or imprisonment for seven years or upwards,' *ibid.* Before a person can be tried under this section, he should be given an opportunity, not before the police, but before the magistrate, of proving

the truth of his complaint, 6 Cal. 496, 584; but see *ibid.* 582. And no Court can take cognizance of an offence under secs. 205-211, when committed in or in relation to any proceeding in any Court, except with the previous sanction, or on the complaint of such Court or some Court to which it is subordinate, Cr. P. C. sec. 195.

As to the procedure before framing a charge under sec. 211, see 8 Ben. Appx. 11.

As to false charges of having committed an unnatural offence, see the Whipping Act, sec. 4.

A person cannot be convicted of abetting a false charge, solely on the ground of having given evidence in support of it, 9 Ben. Appx. 16.

⁴ Sec. 40, cl. 3.

⁵ This intention may be inferred when the prosecution has proved (1) the commission of an offence, (2) the harbouring or concealment of the offender, (3) knowledge or cause for believing that the person harboured or concealed is the offender.

for a term which may extend to three years, and shall also be liable to fine ;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender ¹.

Illustration.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

213. Whoever accepts, or attempts to obtain, or agrees to ^{Taking gift &c. to screen offender.} accept any gratification ² for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence ³ or of his screening any person from legal punishment for any offence ³, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death ⁴, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years ⁵, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

and if the offence is punishable with imprisonment not extending to ten years ⁶, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of

¹ Cases where a parent, child, master, servant, or brother harbours his offending child, parent, servant, master, or brother, therefore come under this section.

² See sec. 161.

³ Sec 40, cl. 2.

⁴ Supra, p. 25.

⁵ Supra, p. 25.

⁶ Supra, p. 25.

imprisonment provided for the offence, or with fine, or with both.

Offering
gift or re-
stitution of
property in
considera-
tion of
screening
offender.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification¹ to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death², be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years³, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years⁴, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded⁵.

Taking gift
to help to
recover
stolen prop-
erty, &c.

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by an offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁶.

¹ See sec. 161.

² Supra, p. 25.

³ Supra, p. 25.

⁴ Supra, p. 25.

⁵ See the Cr. Pr. C. sec. 345.

⁶ This section is primarily aimed at professional trackers and other per-

sons who, being usually in league with thieves or well aware of their proceedings, obtain money etc. for the recovery of stolen property, without making any effort to bring the offenders to justice, M. & M. 178. It would however apply to cases of persons

216. Whenever any person convicted of or charged with an offence¹, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,

Harbour-
ing escaped
offender.

if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

if the offence is punishable with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine ;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

' Offence ' in this section includes also any act or omission of which a person is alleged to have been guilty out of British India which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or under the Fugitive Offenders Act, 1881², or otherwise, liable to be apprehended or detained in custody in British India ; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Act X of
1886, sec.
23.

taking rewards offered in advertisements for the return of stolen property. And such advertisements might amount to abetments of the offence punishable under sec. 215.

¹ Sec. 40, cl. 3. Sec. 216 as amended

by Act X of 1886, sec. 23, may apply where the person harboured was charged with an offence committed out of British India by a foreigner and against the foreign law.

² 44 & 45 Vic. c. 69.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

Public servant disobeying law with intent to save person from punishment or property from forfeiture.

217. Whoever, being a public servant, knowingly disobeys any direction of the law¹ as to the way in which he is to conduct himself as such public servant, intending thereby to save or knowing it to be likely that he will thereby save any person from legal punishment or subject him to a less punishment than that to which he is liable, or with intent to save or knowing that he is likely thereby to save any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both².

Public servant framing incorrect record with like intent.

218. Whoever, being a public servant, and being, as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent³ to cause or knowing it to be likely that he will thereby cause loss or injury to the public or to any person, or with intent thereby to save or knowing it to be likely that he will thereby save any person from legal punishment, or with intent to save or knowing that he is likely thereby to save any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both⁴.

¹ That is, some positive direction such as is contained in the Criminal Procedure Code, secs. 44, 45. The words do not extend to the more general obligation by which every subject is bound not to stifle a criminal charge, 1 Mad. 266.

² For the purpose of a conviction under this section it is enough to show that the accused has 'knowingly disobeyed,' etc., and that he should have done this 'intending,' etc. It is not necessary also to show that in point of fact the person intended to be saved had committed an offence or was justly liable to legal punish-

ment, 3 Cal. 412: *Suth.* 1864, Cr. 5, col. 2.

³ That the intention is an essential ingredient of an offence under sec. 218, see 8 *Suth. Cr.* 27, 68.

⁴ Z, a public servant, charged as such with the preparation of a certain statement of accounts, prepares it from abstracts made and read to him by A, another public servant. A, with intent etc., makes and reads to Z false abstracts, whereby the statement is incorrectly framed. A is not guilty of an offence under sec. 218; but he is guilty of abetting that offence, 7 N. W. P. 134.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding¹, any report, order, verdict or decision which he knows² to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Public servant in judicial proceeding corruptly making illegal order.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously³ commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing⁴ that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illegal commitment or confinement.

221. Whoever, being a public servant, legally bound as such public servant⁵ to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence⁶, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

Intentional omission of public servant to apprehend.

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with death; or

With imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence

¹ See sec. 193.

² This section must be read with sec. 77: it contemplates some wilful excess of authority, in other words, a guilty knowledge superadded to an illegal act. Knowledge that the commitment is contrary to law is a question of fact, and its existence or non-existence must be inferred from

the circumstances of each case; 9 Bom. H. C. 354.

³ See p. 11, supra.

⁴ Actual knowledge must, apparently, be proved. It will not be enough to show that the accused had 'reason to believe' (sec. 26).

⁵ 3 All. 60.

⁶ Sec. 40, cl. 2.

punishable with transportation for life or imprisonment for a term which may extend to ten years ; or

With imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with imprisonment for a term less than ten years.

Intentional omission of public servant to apprehend person under sentence.

222. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice for any offence¹ or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say:—

With transportation for life or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement or who ought to have been apprehended is under sentence of death ; or

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement or who ought to have been apprehended is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or penal servitude for life, or to transportation or penal servitude or imprisonment for a term of ten years or upwards ; or

With imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years, or if the person was lawfully committed to custody.

Escape negligently suffered by public servant.

223. Whoever, being a public servant² legally bound as such public servant to keep in confinement any person charged with or convicted of any offence¹ or lawfully committed to custody, negligently suffers such person to escape from confine-

¹ Sec. 40, cl. 2.

² e. g. a convict-warder, 7 Suth. Cr. 99, col. 1.

ment, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence¹ with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody² in which he is lawfully detained for any such offence³, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁴.

Resistance to lawful apprehension.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted⁵.

225. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence¹, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

Resistance to lawful apprehension of another person.

Or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence¹ punishable with transportation for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

Or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

Or, if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court of

¹ Sec. 40, cl. 2.

² i. e. custody under criminal process, 6 Bom. H. C., Cr. Ca. 27.

³ 5 Mad. 22; 3 Mad. H. C. Rulings, xi. A person in custody from his inability

to give security is not in such custody as is intended by this section, 3 Mad. H. C. Rulings, xxiii.

⁴ See sec. 99.

⁵ 8 Suth. Cr. 85–86.

Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

Or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine ¹.

Omission to apprehend, or sufferance of escape, on part of public servant in cases not otherwise provided for.

225 A. Whoever being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222, or section 223, or in any other law for the time being in force, omits to apprehend that person, or suffers him to escape from confinement, shall be punished—

(a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and

(b) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both ².

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.

225 B. Whoever, in any case not provided for in section 224 or section 225, or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both ³.

¹ The rescue of a prisoner arrested by a police-officer as a member of an unlawful assembly is an offence under this section, 13 *Suth. Cr.* 75.

² Act X of 1886, sec. 24. See 12 *Cal.* 190.

³ Act X of 1886, sec. 24. One who

escapes from custody in which he is detained for failing to furnish security for good behaviour is punishable under this section ; so is one who, when being taken before a magistrate in order to furnish security, escapes from custody, 8 *Cal.* 331.

226. Whoever, having been lawfully transported, returns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported ¹. Unlawful return from transportation.

227. Whoever, having accepted any conditional remission of punishment ², knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered. Breach of condition of remission of punishment.

228. Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both ³. Insult to public servant in judicial proceeding.

229. Whoever, by personation or otherwise, shall intentionally cause or knowingly suffer himself to be returned, empanelled, or sworn as a jurymen or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled, or sworn ⁴, or knowing himself to have been so returned, empanelled, or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Personating juror or assessor.

¹ To constitute this offence, the convict must have been actually sent to a penal settlement and have returned before his term of transportation had expired or been remitted, 4 Mad. H. C. 152.

² See Act V of 1871, secs. 21, 23.

³ Prevarication by a witness may, though it does not necessarily (4 Bom. H. C., Cr. Ca. 7), amount to a contempt of Court, within the meaning of this section, 10 Bom. H. C. 69.

A bids for an estate at an execution-sale, knowing that he cannot deposit the earnest-money. A has committed an offence under this section, Suth.

1864, Misc. R. 3.

But leaving the Court when ordered to remain, and making signs from outside to a prisoner on his trial, have been ruled by the Madras High Court not to be offences under this section, Mayne, P. C. 202.

As to the procedure when an offence under sec. 228 is committed in the view or presence of a Court or Registration-officer, see Cr. P. Code, secs. 479, 483, 484. As to the sanction or complaint necessary when it is committed in, or in relation to, any proceeding in any Court, see *ibid.* sec. 195.

⁴ See Cr. P. Code, sec. 278.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS¹.

'Coin' defined.

230. Coin is metal used for the time being as money², and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

Queen's coin.

Coin stamped and issued by the authority of the Queen, or by the authority of the Government of India or of the Government of any Presidency, or of any Government in the Queen's dominions, is the Queen's coin.

Illustrations.

- (a) Cowries are not coin.
- (b) Lumps of unstamped copper, though used as money, are not coin.
- (c) Medals are not coin, inasmuch as they are not intended to be used as money.
- (d) The coin denominated as the Company's rupee is the Queen's coin.

Counter-
feiting
coin.

231. Whoever counterfeits³ or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A person commits this offence, who, intending to practise deception, or knowing it to be likely that deception

¹ As to the trial of persons previously convicted under this chapter, see Cr. P. C. sec. 348.

² Money is a general standard of value and medium of exchange. The test of whether a particular piece of metal is money or not (supposing it genuine) is the possibility of taking it into the market and obtaining goods of any kind in exchange for it. For this, its value must be ascertained and notorious; that it is known to persons of special skill or information is not sufficient. To counterfeit a coin

of the Emperor Akhbar's time was accordingly held not to be an offence under secs. 230 and 231; see 11 Bom. H. C. 172. But Kuldar and Jaypur gold mohurs, which though they do not pass at an absolutely fixed value, yet have a current value, not ascertainable merely by weighing them as lumps of gold, but attaching to them as coin, come within this definition, 5 N. W. P. 187.

³ Sec. 28. It is unnecessary to prove uttering, or an attempt to utter.

will thereby be practised, causes a genuine coin to appear like a different coin ¹.

232. Whoever counterfeits ² or knowingly performs any part of the process of counterfeiting the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells, or disposes of any die or instrument, for the purpose of being used, or knowing or having reason to believe ³ that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ⁴.

234. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells, or disposes of any die or instrument, for the purpose of being used, or knowing or having reason to believe ⁵ that it is intended to be used, for the purpose of counterfeiting the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

235. Whoever is in possession ⁶ of any instrument or material for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe ³ that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the coin to be counterfeited is the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

¹ A mere medal is not counterfeit coin though fraudulently represented to an ignorant person as being money, *Mad. H. C. ruling, cited Mayne, P. C. 204.*

² See note 3, p. 184.

³ Sec. 26.

⁴ But see secs. 76, 79.

⁵ As to the meaning of 'possession' see sec. 27, and *supra*, p. 56.

Abetting
in India
counter-
feiting out
of India
of coin.

236. Whoever, being within British India, abets¹ the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Import or
export of
counterfeit
coin.

237. Whoever imports into British India, or exports therefrom, any counterfeit coin, knowing or having reason to believe² that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Import or
export of
counterfeit
Queen's
coin.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe³ to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of
coin, pos-
sessed with
knowledge
that it
is coun-
terfeit.

239. Whoever, having any counterfeit coin which at the time when he became possessed³ of it he knew to be counterfeit, fraudulently⁴ or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine⁵.

Delivery
of Queen's
coin, pos-
sessed with
know-
ledge that
it is coun-
terfeit.

240. Whoever, having any counterfeit coin which is a counterfeit of the Queen's coin, and which at the time when he became possessed³ of it he knew to be a counterfeit of the Queen's coin, fraudulently⁴ or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of
coin as
genuine
which,
when first
possessed,

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it

¹ Sec. 108.

² Sec. 26.

³ As to 'possession' see sec. 27, and p. 56.

⁴ Sec. 25.

⁵ This section is directed, not against the coiner, but against professional dealers in counterfeit coin, 3 N. W. P. 150: M. & M. 190.

into his possession¹, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both².

deliverer
did not
know to be
counter-
feit.

Illustration.

A, a coiner, delivers counterfeit Company's rupees to his accomplice *B*, for the purpose of uttering them. *B* sells the rupees to *C*, another utterer, who buys them knowing them to be counterfeit. *C* pays away the rupees for goods to *D*, who receives them, not knowing them to be counterfeit. *D*, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here *D* is punishable only under this section, but *B* and *C* are punishable under section 239 or 240 as the case may be.

242. Whoever, fraudulently³ or with intent that fraud may be committed, is in possession¹ of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine⁴.

Possessing
counterfeit
coin by one
who knew
it to be
counterfeit
when he
received it.

243. Whoever, fraudulently³ or with intent that fraud may be committed, is in possession¹ of counterfeit coin which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine⁵.

Possessing
Queen's
coin by
one who
knew it to
be counter-
feit when
he received
it.

244. Whoever, being employed in any mint lawfully established in British India⁶, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or

Person em-
ployed in
mint
causing
coin to be
of illegal

¹ As to 'possession' see sec. 27, and supra, p. 56.

² The gist of an offence under this section is that *A* should deliver to *B*, or attempt to induce *B* to receive, as genuine, coin which *A* knows to be counterfeit, but which he did not know to be counterfeit when he took it into his possession. Thus where *A* put coins which he knew to be counterfeit into *B*'s hand, telling *B* to keep them for him, *A* was held not guilty

under this section, 4 N. W. P. 62.

³ Sec. 25.

⁴ This section is directed against professional utterers.

⁵ It is not necessary to prove that any wrongful gain accrued to the person charged, or that loss was caused to the Government or the public, *M. & M.* 192.

⁶ Under Act XXIII of 1870. There are now mints in British India only at Calcutta and Bombay.

weight or
composition.

composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine¹.

Taking
coining
tool from
mint.

245. Whoever, without lawful authority, takes out of any mint lawfully established in British India², any coining tool or instrument³, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Diminish-
ing weight
or altering
compo-
sition of
coin.

246. Whoever fraudulently⁴ or dishonestly⁵ performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.

Diminish-
ing weight
or altering
compo-
sition of
Queen's
coin.

247. Whoever fraudulently⁴ or dishonestly⁵ performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Altering
appearance
of coin
with in-
tent.

248. Whoever performs on any coin any operation which alters the appearance of that coin with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Altering
appearance
of Queen's
coin with
intent, etc.

249. Whoever performs on any of the Queen's coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description⁶, shall be punished with imprisonment of either de-

¹ See note 5, p. 187.

² See note 6, p. 187.

³ This seems to mean any tool or instrument appearing on its face to be intended for the purpose of making coin.

⁴ Sec. 25.

⁵ Sec. 24.

⁶ The offence is complete though no fraudulent purpose can be proved, M. & M. 194.

scription for a term which may extend to seven years, and shall also be liable to fine.

250. Whoever, having coin in his possession¹ with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently² or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Delivery of coin received with knowledge that it is altered.

251. Whoever, having coin in his possession¹ with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently² or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin received with knowledge that it is altered.

252. Whoever, fraudulently² or with intent that fraud may be committed, is in possession¹ of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Possession of altered coin by one who knew it to be altered when he received it.

253. Whoever, fraudulently² or with intent that fraud may be committed, is in possession¹ of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with

Possession of Queen's coin by one who knew it to be altered when he received it.

¹ As to 'possession' see sec. 27, and supra, p. 56.

² Sec. 25.

have been before used. Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Erasure of mark denoting that stamp has been used.

263. Whoever, fraudulently¹ or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession², or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

¹ Sec. 25.

² As to 'possession' see sec. 27, and *supra*, p. 56.

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES¹.

264. Whoever fraudulently² uses any instrument for weighing which he knows to be false³, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false instrument for weighing.

265. Whoever fraudulently² uses any false³ weight or false³ measure of length or capacity, or fraudulently² uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false weight or measure.

266. Whoever is in possession⁴ of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false³, and intending that the same may be fraudulently² used⁵, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Possessing false weights or measures.

267. Whoever makes, sells, or disposes of, any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false³, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Making or selling false weights or measures.

¹ Offences under secs. 264, 265, 266 may be tried summarily, Cr. P. C. sec. 260.

² Sec. 25.

³ 'false' here means 'different from the instrument, weight or measure which the offender and the person defrauded have fixed upon, expressly or by implication, with reference to their mutual dealings.'

⁴ See note 2, p. 192.

⁵ The fraudulent intent must be charged and proved, 1 Bom. H. C. 181. But of course the mere possession of the false instrument or measure, if such possession cannot be satisfactorily accounted for, is sufficient ground for presuming an intent to use it fraudulently, M. & M. 202.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY, AND MORALS.

Public
nuisance.

268. A person ¹ is guilty of a public ² nuisance, who does any act, or is guilty of an illegal ³ omission, which causes any common injury ⁴, danger or annoyance to the public or to the people in general ⁵ who dwell or occupy property in the vicinity ⁶, or which must necessarily cause injury ⁴, obstruction, danger or annoyance to persons who may have occasion to use any public right ⁷.

A common nuisance is not excused on the ground that it causes some convenience or advantage ⁸.

Negligent
act likely
to spread
infection of
dangerous
disease.

269. Whoever unlawfully or negligently ⁹ does any act which is, and which he knows or has reason to believe ¹⁰ to be, likely to spread the infection of any disease dangerous to life ¹¹, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

¹ Sec. 11.

² Sec. 12.

³ Sec. 43.

⁴ Sec. 44.

⁵ For example, carrying on trades injurious to health or comfort, making great noises, keeping large quantities of gunpowder, etc. As to abating such nuisances see the Cr. P. Code, cc. X and XI.

Sec. 268 does not apply to acts or omissions calculated to offend the sentiments of a class or sect, 7 Mad. 591; such, for instance, as the erection by Muhammadan residents in a Hindú village, in the neighbourhood of Hindú temples, of a shed containing a religious symbol. Nor does a harlot who merely visits a dák-bungalow at the request of a traveller, remains therein for half-an-hour, and during that time prostitutes herself to him, commit an offence under this section, 2 N. W. P. 352.

⁶ Sec. 11.

⁷ Such, e.g. as the right to use a

public road or to pass up or down a navigable river.

⁸ A common gaming-house (i.e. one in which instruments of gaming are kept for the profit of the owner or occupier) may constitute a public nuisance within the meaning of this section, but there must be some evidence of actual annoyance to the public, etc., 7 Bom. H. C., Cr. Ca. 74.

⁹ Supra, p. 11.

¹⁰ Sec. 26.

¹¹ e.g. a person to his own knowledge suffering from cholera, who travels in a train without informing the railway servants of his condition, 7 Mad. 276. But inoculating *bond fide* as a preventive against small-pox would not be punishable under this section, Mad. H. C. Ruling, cited in Mayne, P. C. 221. Mr. Mayne seems to think that a syphilitic prostitute, who unlawfully or negligently practises her profession, might be punished under this section.

270. Whoever malignantly¹ does any act which is, and which he knows or has reason to believe² to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Malignant act likely to spread infection of dangerous disease.

271. Whoever knowingly disobeys any rule made and promulgated by the Government of India, or by any Government, for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both³.

Disobeying quarantine rules.

272. Whoever adulterates any article of food or drink, so as to make such article noxious⁴ as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁵.

Adulterating food intended for sale.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink⁶, knowing or having reason to believe² that the same is noxious as food or drink⁶, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁵.

Selling noxious food.

274. Whoever adulterates⁷ any drug or medical preparation intended to consume it. If a sold meat as food for dogs, he would not be guilty under this section if it merely appeared that the meat was unfit for the food of men and that he knew it to be noxious as food for men.

Adulterating drugs.

¹ Supra, p. 11.

² Sec. 26.

³ See Act I of 1870.

⁴ i. e. injurious to health. Mixing water with milk, sloe-leaves with tea, or chicory with coffee would not be punishable under this section, Mayne, P. C. 222.

⁵ On a conviction under sec. 272, 273, 274 or 275, the Court may order the food etc., in respect of which the conviction was had, to be destroyed, Cr. P. C. sec. 521.

⁶ i. e. for or as food or drink for those

intended to consume it. If a sold meat as food for dogs, he would not be guilty under this section if it merely appeared that the meat was unfit for the food of men and that he knew it to be noxious as food for men.

⁷ i. e. apparently mixes with any other substance, whether wholly different or of the same kind but inferior quality. Mr. Mayne, P. C. 224, however, thinks that to mix an inferior quality of cod-liver oil with a superior quality of that drug would

in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both ¹.

Selling
adulterated
drugs.

275. Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both ¹.

Selling any
drug as a
different
drug.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Fouling
public
spring or
reservoir.

277. Whoever voluntarily ² corrupts or fouls the water of any public spring ³ or reservoir ⁴, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both ⁵.

not come under this section, though the drug's efficacy would be lessened by the mixing.

¹ See note 5, p. 195.

² Sec. 139.

³ This does not include a public river (2 Cal. 383), or a continuous stream of water running along the bed of a river (4 Mad. 229), though it

may be ordinarily used for domestic purposes.

⁴ This does not apply to mere bathing in a tank, not set apart by any lawful order for bathing purposes, 1 Mad. H. C. Pro., cited Mayne, P. C. 225.

⁵ As to trying these offences summarily, see Cr. P. Code, sec. 261.

278. Whoever voluntarily¹ vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees².

Making atmosphere noxious to health.

279. Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent³ as to endanger human life, or to be likely to cause hurt or injury to any other person⁴, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁵.

Rash driving or riding on a public way.

280. Whoever navigates any vessel in a manner so rash or negligent³ as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁵.

Rash navigation.

281. Whoever exhibits any false light, mark, or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exhibition of false light, mark or buoy.

282. Whoever knowingly or negligently³ conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁵.

Conveying person by water for hire in a vessel overloaded or unsafe.

283. Whoever, by doing any act, or by omitting to take

Causing obstruction

¹ Sec. 29.

² As to trying this offence summarily, see Cr. P. Code, sec. 261.

³ Supra, p. 11.

⁴ It is not necessary that the rash or negligent act should result in injury to life or property; and the doctrine of contributory negligence does not apply where the immediate

cause of the injury was the rashness or negligence of the defendant, 6 Mad. H. C., Appx. xxxiii.

⁵ As to the punishment of offences of this nature when committed by masters and sailors of British sea-going vessels, see Act I of 1859, s. 79.

⁶ 1 Bom. H. C. 137. Where the conveying is not for hire, see sec. 336.

or injury in order with any property in his possession¹, or under his charge²,
public way. causes danger, obstruction or injury to any person³ in any
public way or public line of navigation⁴, shall be punished
with fine which may extend to two hundred rupees.

284. Whoever does, with any poisonous substance, any
Negligent act in a manner so rash or negligent⁵ as to endanger human
conduct re- specting life, or to be likely to cause hurt or injury to any other person,
poisonous or knowingly or negligently⁵ omits to take such order with
substance. any poisonous substance in his possession as is sufficient to
guard against any probable danger to human life from such
poisonous substance, shall be punished with imprisonment of
either description for a term which may extend to six months,
or with fine which may extend to one thousand rupees, or
with both.

285. Whoever does, with fire or any combustible matter,
Negligent any act so rashly or negligently⁵ as to endanger human life,
conduct re- specting life, or to be likely to cause hurt or injury⁶ to any other person,
fire or com- or knowingly or negligently⁵ omits to take such order with
bustibles. any fire or any combustible matter in his possession as is
sufficient to guard against any probable danger to human life
from such fire or combustible matter, shall be punished with
imprisonment of either description for a term which may
extend to six months, or with fine which may extend to one
thousand rupees, or with both⁷.

286. Whoever does, with any explosive substance, any act
Negligent so rashly or negligently⁵ as to endanger human life, or to be
conduct re- specting likely to cause hurt or injury to any other person, or know-
explosives. ingly or negligently⁵ omits to take such order with any explo-
sive substance in his possession as is sufficient to guard against

¹ i. e. of which he is the occupant, Mayne, P. C. 237.

² Property is 'under the charge' of the person whose duty it is, in consequence of that position, to do or refrain from the particular act which is the ground of complaint. Thus if *A* puts *B* in charge of *A*'s house during his absence, and *B* lets off rockets from the windows so as to frighten the horses of the passers-by, *B* has committed an offence under this section. But *B* will not be answer-

able for omissions to repair the house, which he has neither power nor express authority to do, *ibid.* 237-238.

³ The danger etc. must be caused to some particular individual or individuals, 4 Mad. 235.

⁴ See Act XVI of 1881.

⁵ *Supra*, p. 11.

⁶ This includes harm to property as well as to person, 5 Bom. H. C., Cr. Ca. 67; see sec. 44.

⁷ As to trying offences under this section summarily, see Cr. P. Code, 261.

any probable danger to human life from that substance¹, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both².

287. Whoever does, with any machinery, an act so rashly or negligently³ as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently³ omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁴.

Negligent conduct with respect to machinery.

288. Whoever, in pulling down or repairing any building, knowingly or negligently³ omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof⁵, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Negligence with respect to pulling down or repairing buildings.

289. Whoever knowingly or negligently³ omits⁶ to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt⁷ from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both⁸.

Negligence with respect to animals.

¹ Danger to human life must be a probable cause of the omission. *A* after watching his crops at night with a loaded gun returns to his house at dawn, and finding the door locked, places the gun loaded, with the hammer down on the cap, outside the house, and goes for a short time to his neighbour's. *Z*, a four-year-old child, comes and plays with the gun, causes it to explode, and is killed by the explosion. *A* has not committed an offence under this section, 8 Mad. 421.

² The Police Acts for the Presidency towns have provisions on this

subject, and see Act IV of 1884 (*to regulate the manufacture, possession, use, sale, transport and importation of explosives*). As to trying offences under sec. 286 summarily, see Cr. P. C. sec. 261.

³ *Supra*, p. 11.

⁴ See the Factories Act XV of 1881.

⁵ The section does not provide for the fall of scaffolding &c. provided for repairing the building, M. & M. 214.

⁶ 19 *Suth. Cr. 1*, where the Court thought that sec. 289 referred to tame as well as to savage animals.

⁷ Sec. 320.

⁸ To support a charge under this

Punish-
ment for
public
nuisance.

290. Whoever commits¹ a public nuisance² in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees³.

Continuing
nuisance
after in-
junction to
discon-
tinue.

291. Whoever repeats or continues a public nuisance⁴, having been enjoined by any public servant⁵ who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Selling
&c. ob-
scene
books.

292. Whoever sells or distributes, imports or prints for sale or hire, or wilfully exhibits to public view, any obscene book⁶, pamphlet, paper, drawing, painting, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any representation sculptured, engraved, painted, or otherwise represented, on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose⁷.

section for negligent omission there should be evidence, not only of negligence, but also that such negligence would probably lead to danger to human life or of grievous hurt, 3 Mad. H. C. Rulings, xxxiii. As to trying offences under secs. 289 and 290 summarily, see Cr. P. C. sec. 261.

¹ These words probably include a person who continues a nuisance created by another, M. & M. 215.

² Sec. 268. Omission to fence a well within eight yards of a highway and open to it is not a public nuisance, 6 Mad. 280. Nor is omission to keep one's ponies from straying, 6 Suth. Cr. 71, col. 2. Nor gambling in a private house, Mad. H. C. Pro., Mayne, P. C. 244. But inducing villagers to play cards on a public road and winning money from them is punishable under this section, *ibid.*; and so, apparently, would storing up a great bulk of water in a tank so negligently as to endanger the neighbours' lives.

³ And rigorous imprisonment may be imposed in default of paying the fine, 5 Mad. 157. See sec. 66, *supra*.

⁴ Sec. 268.

⁵ Sec. 21.

⁶ A book may be 'obscene' which contains only one obscene passage, 3 All. 837. The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall, per Cockburn C.J., L. R. 3 Q. B. 360, 371.

⁷ As to trying offences under these sections summarily, see Cr. P. C. 261.

On a conviction under sec. 292 or 293 the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court, or remain in the possession or power of the person convicted, Cr. P. C. sec. 521.

A charge under sec. 292 or 294 should be specific as to the words etc. alleged to be obscene, and the Magistrate should expressly state what he finds to have been uttered etc., so that the legality of the conviction may be open to examination upon appeal, 1 Cal. 356.

293. Whoever has in his possession¹ any such obscene book or other thing as is mentioned in the last preceding section for the purpose of sale, distribution, or public exhibition, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both².

Possessing
obscene
book for
sale or ex-
hibition.

294. Whoever sings, recites, or utters in or near any public place³ any obscene song, ballad, or words to the annoyance of others⁴, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both⁵.

Singing
obscene
songs.

294 A. Whoever keeps any office or place for the purpose of drawing any lottery not authorised by Government, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Keeping
lottery-
office.

And whoever publishes⁶ any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery⁷, shall be punished with fine which may extend to one thousand rupees⁸.

¹ Sec. 27, and supra, p. 56.

² See note 7, p. 200.

³ This would include a railway train and a public urinal, Mayne, P. C. 246.

⁴ This includes the singular, sec. 9.

⁵ *A* sends for publication to *B*, the proprietor of a newspaper, an advertisement of a lottery not authorised by Government. *B* publishes the advertisement. *B* as well as *A* has committed an offence under this section, 10 Bom. 100, following *King v. Smith*, 4 T. R. 414.

⁶ i. e. any lottery, whether Indian or foreign, not authorised by Government as defined in sec. 17; see 10 Bom. 100.

⁷ Except by this section (which is a re-enactment of Act V of 1834), gambling is not prohibited in the Madras mufassal, 7 Mad. 301.

No Court can take cognizance of any offence punishable under this section unless upon complaint made by order of, or under authority from, the Government, Cr. P. C. sec. 196.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION¹.

Injuring
or defiling
place of
worship,
with in-
tent.

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Disturbing
religious
assembly.

296. Whoever voluntarily² causes disturbance³ to any assembly lawfully⁴ engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Trespass-
ing on
burial-
places, &c.

297. Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby⁵, commits any trespass⁶ in any place of worship or on any place of sepulture or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the

¹ See secs. 76-80.

² Sec. 39.

³ 7 All. 474, 475.

⁴ A religious assembly held in a public street or thoroughfare, so as to cause obstruction, is probably not 'lawfully engaged' within the meaning of this section, M. & M. 219.

⁵ A trespass committed with the knowledge that a person is likely to consider it an insult to his religion

comes within these words, M. & M. 220.

⁶ A co-owner in possession cannot be held to have committed trespass unless he ousts another co-owner from possession, or commits some destruction or waste of the common property, as by pulling down a common wall or by digging and carrying away turf, 3 Mad. 178.

performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

298. Whoever, with deliberate¹ intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both².

¹ The framers of the Code seem to have used this word as equivalent to 'premeditated.' (Second Report, 1847, s. 252.) The Courts do not

seem to have put any construction on this dangerous section.

² This offence may be compounded, Cr. P. C. sec. 345.

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

Of Offences affecting Life.

Culpable
homicide.

299. Whoever causes death by doing an act¹ with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death², commits the offence of culpable homicide³.

¹ This includes illegal omissions, sec. 32: as where, for example, A, a hired guide, deserts Z, a traveller, in a jungle, where Z dies: A being legally bound to supply food to Z, the mother of a suckling, omits to do so, knowing that Z's death may result, and Z survives, but the child dies: A keeps Z in wrongful confinement, and being in consequence bound to supply him with everything necessary for his life, omits to procure medical advice for him, knowing that he is likely to die for want of it, and Z dies accordingly: A, a peon, stationed by authority to warn travellers from attempting to ford a river, omits to tell a traveller, Z, that he cannot safely ford it, and by this omission voluntarily causes Z's death. A's savage dog fastens on Z; A omits to call off the dog, knowing that if it is not called off it is likely that Z will be killed, and Z is killed.

² The words 'causes death by doing an act . . . with the knowledge that he is likely by such act to cause death,' like sec. 300, cl. 4, apply to cases where there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, the offence is culpable homicide; if it is the most

probable result, the offence is murder, 1 Bom. 345. There are many cases falling within the words 'or with the knowledge that he is likely by such act to cause death' that do not fall within the 2nd, 3rd, or 4th clauses of sec. 300, such, for instance, as the offences described in secs. 279, 280, 281, 282, 284, 285, 286, 287, 288, and 289, if the offender knows that his act or illegal omission is likely to cause death, and if, in fact, it does cause death, F. B. R. 451, per Peacock C.J. This section must of course be read with sec. 79.

³ Three crimes are contemplated: 1. Causing death by doing an act with the intention of causing death. This is culpable homicide: it is also murder, unless the case falls within one of the exceptions in sec. 300. 2. Causing death with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death. This is culpable homicide: it is also murder, unless the case falls within one of the exceptions (see sec. 300, cl. 3). 3. Causing death by doing an act with the knowledge that such act is likely to cause death. This is culpable homicide, but it is not murder, even if it does not fall within any of the exceptions mentioned in sec. 300, unless it falls within clauses 2, 3, or 4 of sec. 300, F. B. R. 451, per Peacock C.J.

Illustrations.

(a) *A* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. *Z*, believing the ground to be firm, treads on it, falls in and is killed. *A* has committed the offence of culpable homicide.

(b) *A* knows *Z* to be behind a bush. *B* does not know it. *A*, intending to cause, or knowing it to be likely to cause *Z*'s death, induces *B* to fire at the bush. *B* fires and kills *Z*. Here *B* may be guilty of no offence; but *A* has committed the offence of culpable homicide.

(c) *A*, by shooting at a fowl with intent to kill and steal it, kills *B*, who is behind a bush; *A* not knowing that he was there. Here, although *A* was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill *B*, or to cause death by doing an act that he knew was likely to cause death¹.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented².

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide³. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Except in the cases hereinafter excepted, culpable Murder. homicide is murder,

[1stly].—If the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused⁴, or—

¹ *A*, intending to brand a thief, causes extensive superficial burns on his skin, knowing from the thief's emaciated condition that the burns are likely to cause his death, but without any intention to cause death. *A* has committed the offence of culpable homicide, 7 *Suth. Cr.* 54, col. 2.

² Conversely, where *A* inflicts a wound on *Z* which necessitates a surgical operation, and *Z* sinks under the

operation, *A* is criminally responsible.

³ See sec. 315.

⁴ The offence is murder if the offender knows that the particular person injured is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death, 1 *Bom.* 345.

3rdly.—If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death¹, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse² for incurring the risk of causing death or such injury as aforesaid³.

Illustrations.

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

¹ As to framing a charge under clauses 2 and 3, see 8 Cal. 213. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same as that noticed above (sec. 299, note). It is a question of degree of probability. Practically, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from a fist or a stick on a vital part may be 'likely to cause death'; a wound from a sword in a vital part is 'sufficient in the ordinary course of nature to cause death'; 1 Bom. 346, 347; and see 5 Cal. 351, where a snake-charmer placed a cobra on a boy's head, knowing that it was likely to bite and kill him, but not intending to cause his

death. 'In short,' says Mr. Mayne, 'where the positive intention to cause death is negatived, the difference between murder and culpable homicide is a mere question as to the different degrees of probability that death would ensue. Where death must have been known to be a probable result, it is culpable homicide. Where it must have been known to be *the most* probable result, then it is murder, Mayne, P. C. 258, citing 6 N. W. P. 26 and 1 Bom. 342.

² See sec. 81.

³ The fourth clause appears to be designed to provide for that class of cases where the acts resulting in death are calculated to put the lives of many persons in jeopardy without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequences, M. & M. 240.

(d) *A* without any excuse fires a loaded cannon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a premeditated design to kill any particular individual¹.

Exception 1.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation², causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident³.

When culpable homicide is not murder.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily⁴ provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant⁵ in the lawful exercise of the powers of such public servant.

Thirdly. That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

Illustrations.

(a) *A*, under the influence of passion excited by a provocation given by *Z*, intentionally kills *Y*, *Z*'s child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) *Y* gives grave and sudden provocation to *A*. *A*, on this provocation, fires a pistol at *Y*, neither intending nor knowing himself to be likely to kill *Z*, who is near him, but out of sight.

¹ So if *A* poisons a well from which people are accustomed to draw water and one of them dies of the poison. So if *A* places across a railway a tree which upsets a train and kills a passenger.

² 3 Ben. App. Cr. 33, where the prisoner saw a native doctor actually ravishing his wife. In determining whether the provocation was of a character to deprive the offender of his self-control, the Court may take into account the mental condition in which he was at the time of the provocation, 2 Mad. 122.

³ To give an accused person the benefit of this exception, it ought to be shown distinctly, not only that the

act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause, 1 Ben. App. Cr. 11 (S. C. 10 Suth. Cr. 26). 'It is not every case,' said Norman J., 'where self-control is lost, which is protected by this exception, but only such cases as exhibit a provocation which would, in the common course of things, be expected *a priori* to deprive the offender of self-control to a sufficient extent to admit of the fatal act being committed,' 5 Suth. Cr. 38. See also 2 Mad. 122; 3 Mad. 33.

⁴ Sec. 39.

⁵ Sec. 21.

A kills *Z*. Here *A* has not committed murder, but merely culpable homicide.

(c) *A* is lawfully arrested by *Z*, a bailiff. *A* is excited to sudden and violent passion by the arrest, and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) *A* appears as a witness before *Z*, a Magistrate. *Z* says that he does not believe a word of *A*'s deposition, and that *A* has perjured himself. *A* is moved to sudden passion by these words, and kills *Z*. This is murder.

(e) *A* attempts to pull *Z*'s nose. *Z*, in the exercise of the right of private defence, lays hold of *A* to prevent him from doing so. *A* is moved to sudden and violent passion in consequence, and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) *Z* strikes *B*. *B* is by this provocation excited to violent rage. *A*, a by-stander, intending to take advantage of *B*'s rage, and to cause him to kill *Z*, puts a knife into *B*'s hand for that purpose. *B* kills *Z* with the knife. Here *B* may have committed only culpable homicide, but *A* is guilty of murder¹.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith² of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration.

Z attempts to horse-whip *A*, not in such a manner as to cause grievous hurt to *A*. *A* draws out a pistol. *Z* persists in the assault. *A* believing in good faith that he can by no other means prevent himself from being horse-whipped, shoots *Z* dead. *A* has not committed murder, but only culpable homicide³.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant⁴, or aiding a public servant

¹ *A*, *B* and *C*, three brothers, find *Z* lying with their unmarried sister on the same bed. They seize *Z*, drag him from the bed, and maltreat him so that he dies. The provocation here is such as to reduce their offence from murder to culpable homicide, 4 *Suth. Cr.* 38.

² *Sec. 52. See 3 All. 253; 5 N. W. P. 130, 133.*

³ Another illustration: *Z*, a thief, at night makes a hole in the wall of *A*'s house, in which there were but

women, *A*, and his idiot son. *A* awakes, hastily catches up a pole-axe, and with it strikes *Z* five times on the neck, nearly beheading him. *A* has not committed murder, but, as he has inflicted more harm than was necessary for the purpose of defence, he is guilty of culpable homicide, 6 *Suth. Cr.* 50. As to mere words threatening future injury, see 4 *Ben. App.* 101 (*S. C.* 13 *Suth. Cr.* 85).

⁴ *Sec. 21.*

acting for the advancement of public justice¹, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith², believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight³ in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner⁴.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent⁵.

Illustration.

A, by instigation⁶, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he

¹ e. g. officers of police, ministerial officers of courts and jailers performing their respective duties; but not tax-collectors, customs-officers, revenue or survey officers, municipal commissioners and their servants, M. & M. 259.

² See note 2, p. 208.

³ Slaying in premeditated fight is provided for by Excep. 5.

⁴ See 1 *Suth. Cr.* 33; 3 *Suth. Cr.* 18.

⁵ Sec. 90. When, therefore, death results to an adult in a fair fight between two bodies of men, deliberately fighting together and armed with deadly weapons, the offence committed is culpable homicide, not murder, 6 *Cal.* 154. (In 5 *Cal.* 31, however, the Court gave an exactly opposite decision. But exception 5 seems directly intended to abrogate the rule of English law that a combatant in a fair duel who kills his opponent is guilty of murder. If so, says Mr. Mayne, 'the rule must equally apply however numerous the combatants may be, provided they have voluntarily sought the contest, with a knowledge that its result may probably be fatal.')

So where certain snake-charmers professing, and believing themselves, to be able to cure snake-bites, induced a cooly to let himself be bitten by a *korait*, and the cooly died of the bite, 3 *Ben.*, App. Cr. 25. So where a woman, aged 20, overwhelmed with grief for the loss of her child, begged her husband to kill her, and he did so whilst she was asleep, 6 *Suth. Cr.* 58. So, too, in the case of an adult Hindu widow becoming a *sati*, 5 *Cal.* 36. So where Z, a man of 25, pays four unskilful eunuchs to emasculate him and they cut off the whole of his private parts and he dies of the injury, 5 *Suth. Cr.* 7. As to causing the death of a woman with child in an endeavour to procure abortion, when the woman consents to take the risk of death, see sec. 314.

It does not follow that a case of culpable homicide is murder because it does not fall within any of the exceptions in sec. 300. To render culpable homicide murder, the case must come within the provisions of clauses 1, 2, 3 or 4 of sec. 300; 8 *Suth. Cr.* 51, col. 1, per Peacock C.J.

⁶ Sec. 107, Expl. 1.

was incapable of giving consent to his own death; *A* has therefore abetted murder.

Culpable homicide by causing the death of person other than person whose death was intended.

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death¹ of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause².

Punishment for murder.

302. Whoever commits murder shall be punished with death, or transportation for life³, and shall also be liable to fine⁴.

Murder by life-convict.

303. Whoever being under sentence of transportation for life, commits murder, shall be punished with death.

Punishment for culpable homicide not amounting to murder.

304. Whoever commits culpable homicide not amounting to murder shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to

¹ There is no limit to the time within which the death must follow.

² *A* and *B* meet to fight a deliberate duel with pistols. *Z* comes to part them and is killed by a shot fired by *A* at *B* with intent to cause *B*'s death. The culpable homicide is of the description which it would have been if *A* had caused *B*'s death, *M. & M.* 271. *A* intending to kill *B*, the husband of a woman with whom he is carrying on an adulterous intrigue, waylays *B* in the dusk, but by mistake kills *Z*, who is coming along the road, *A* is guilty of the murder of *Z*, 3 *Morl. Dig.*, cited by *Mayne*, *P. C.* 265.

³ Transportation if inflicted must be for life and not (e. g.) for ten years, 6 *Suth. Cr.* 85. The Court in its discretion must decide whether death or transportation should be inflicted. Where a murder was rather retaliation for an injury inflicted on the

murderer than one prompted by any worse passion, the High Court reduced the Session Judge's sentence of death to transportation, 6 *Suth. Cr.* 46. So where *A*, believing *B* to be a wizard and to have caused *A*'s child to become dangerously ill, in order to save the child's life killed *B*, *A*'s punishment was commuted to transportation, 6 *ibid.* 82. So where there was no intention to cause death, but merely a reckless assault with a deadly weapon, which inflicted a bodily injury likely in the ordinary course of nature to cause death, 5 *Suth. Cr.* 20.

As to the duty of the public to give information of the offences punishable under secs. 302, 303, 304, see the *Crim. P. C.* sec. 44.

⁴ A conviction may be had though the body of the murdered person has not been found, 3 *All.* 383, where the learned Judge seemed to think that 'corpus delicti' meant the body.

cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death¹.

304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide², shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both³.

Causing death by negligence.

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets⁴ the commission of such suicide, shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Abetment of suicide of child or insane person.

¹ Two kinds of culpable homicide are mentioned in this section: (a) acts done with the intention of causing death, or of causing such bodily injury as is likely to cause death; (b) acts done without any such intention, but with the knowledge that they are likely to cause death, 6 Ben. Appendix, 86: 18 Suth. Cr. 23.

² Intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded, 3 All. 779. A very learned judge had thus explained 'culpable rashness' and 'culpable negligence,' 7 Mad. H. C. 119; followed in 2 All. 768: 'Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luzuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of

circumspection.' See also 4 Cal. 815.

³ This does not apply to a case in which there has been the voluntary commission of an offence against the person, 4 Cal. 764; or to what a man does with the knowledge that the consequences will be likely to cause death, 5 N. W. P. 40, where a Hindu kicked his wife (a girl of 8 or 9 years of age) with such force as to rupture the anterior coat of her stomach. It applies where the deceased by his own negligence contributed to his death, 6 All. 249, 250. Where in the course of a dispute *A* gave *B* a severe push on the back, which caused *B* to fall two and a-half cubits from the top of *A*'s steps to the road below, and *B* in falling fractured his toe, and died in consequence of the tetanus brought on by the fracture, the Court held that *B* had simply used criminal force (sec. 350), 1 Mad. 224. And see 3 All. 597, where the Court held that the accused had only 'voluntarily caused hurt,' and observed that the offence of causing death by a rash or negligent act is not committed where an intention exists on the part of the offender to cause hurt to some particular person.

⁴ Secs. 107, 108.

Abetment
of suicide
of any
other
person.

306. If any person commits suicide, whoever abets¹ the commission of such suicide² shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Attempt to
murder.

307. Whoever does any act with such intention or knowledge and under such circumstances³ that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt⁴ is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

Attempts
by life-
convicts.

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

Illustrations.

(a) *A* shoots at *Z* with intention to kill him, under such circumstances that, if death ensued, *A* would be guilty of murder. *A* is liable to punishment under this section.

(b) *A*, with the intention of causing the death of a child of tender years, exposes it in a desert place. *A* has committed the offence defined by this section, though the death of the child does not ensue.

(c) *A*, intending to murder *Z*, buys a gun and loads it. *A* has not yet committed the offence. *A* fires the gun at *Z*. He has committed the offence defined in this section; and if by such firing he wounds *Z*, he is liable to the punishment provided by the latter part of this section.

(d) *A*, intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A*'s keeping; *A* has not yet committed the offence defined in this section. *A* places the food on *Z*'s table or delivers it to *Z*'s servants to place it on *Z*'s table. *A* has committed the offence defined in this section⁵.

¹ Secs. 107, 108.

² As in the case of a *sati*, 3 N. W. P. 316.

³ In order to constitute an offence under this section the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events. Therefore where *A* presented an uncapped gun at *B* (believing the gun to be capped) with the intention of murdering *B*, but was prevented from pulling the trigger, *A* could not be convicted, upon a charge framed under this section, of an attempt to murder.

Otherwise, under sec. 511 taken in connection with secs. 299 and 300, see 4 Bom. H. C., Cr. Ca. 17, 21, and *supra*, p. 69.

⁴ Sec. 319.

⁵ The law allows a locus poenitentiae, and will not hold that a person has committed a crime until he has passed beyond the stage of preparation, 3 Mad. 6, where the Court adopted the following passage in an American judgment cited by Bishop, i. 685, note 3: 'Between the preparation for the attempt and the attempt itself there is a wide difference. The

308. Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if hurt¹ is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

309. Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

310. Whoever at any time after the passing of this Act² shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing³ by means of or accompanied with murder, is a Thug.

311. Whoever is a Thug shall be punished with transportation for life, and shall also be liable to fine⁴.

Causing Miscarriage, Injuries to unborn Children, Exposure of Infants, and Concealment of Births.

312. Whoever voluntarily causes⁵ a woman with child to miscarry, shall, if such miscarriage be not caused in good

preparation consists in devising or arranging means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after preparations are made,' 3 Mad. 5; see pp. 67-70, supra.

¹ Sec. 319.

² These words give the Code (so far as this section is concerned) a retrospective operation, for the Code was passed one year, two months, and twenty-five days before it came into force.

³ This doubtless means 'kidnapping

minors from lawful guardianship' (sec. 361). Sections 310 and 311 should be amalgamated thus:—'310. Whoever at any time after the first day of January, 1862, shall have been habitually associated with any other person for the purpose of committing robbery or kidnapping minors from lawful guardianship by means of, or accompanied with, murder, shall be punished with transportation for life, and shall be also liable to fine.'

⁴ See Cr. P. C. sec. 181.

⁵ Sec. 39.

faith¹ for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine².

Explanation.—A woman who causes herself to miscarry is within the meaning of this section³.

Causing
miscar-
riage
without
woman's
consent.

313. Whoever commits the offence defined in the last preceding section without the consent⁴ of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Death
caused by
act done
with intent
to cause
miscar-
riage.

314. Whoever, with the intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the act is done without the consent⁴ of the woman, shall be punished either with transportation for life, or with the punishment above mentioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

Act done
with intent
to prevent
child being
born alive
or to cause
it to die
after birth.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith⁵ for the purpose of saving the life of the mother, be

¹ Sec. 52.

² Where the child was full-grown, the Court declined to convict of causing miscarriage, but convicted under secs. 312 and 511 of an attempt to commit that offence, 19 *Suth. Cr.* 32.

³ But in awarding punishment it should not be forgotten that the high-caste young widow who, to hide her

shame, may at the risk of life cause herself to miscarry, does not under the social circumstances of India commit an offence of like criminality with that of the seducer of a young girl or married woman, who, to cover her offence, causes her to miscarry, *M. & M.* 279.

⁴ Sec. 90.

⁵ Sec. 52.

punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

316. Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide¹, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing death of quick unborn child by act amounting to culpable homicide.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

317. Whoever, being the father or mother of a child² under the age of twelve years, or having the care of such child³, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exposure and abandonment of children.

Explanation.—This section is not intended to prevent the trial of the offender for the murder⁴ or culpable homicide, as the case may be, if the child die in consequence of the exposure⁵.

318. Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before⁶ or after or during its birth, intentionally conceals or endeavours⁷ to conceal the birth of such child⁸, shall be punished with im-

Concealment of birth.

¹ Sec. 299.

² Whether it be legitimate or illegitimate.

³ This does not include a person who has the custody of a child merely for the purpose of exposing it, *Mayne, P. C.* 275.

⁴ Sec. 300.

⁵ And though the child does not die, the exposure may amount to an attempt punishable under sec. 307, *M. & M.* 283. Death 'in consequence of the exposure' means death from cold or some other result of ex-

posure, 10 *Suth. Cr.* 52.

⁶ A person cannot be convicted under this section where the birth was of a mere foetus four months old, 4 *Mad. H. C. Rulings*, lxiii; and see in England *Reg. v. Berriman*, 6 *Cox, C. C.* 388, cited in *Russell on Crimes*, 5th ed. i. 806. And where the child dies the offender ought to be prosecuted for murder, or culpable homicide, and not under sec. 317; 2 *All.* 349.

⁷ i. e. attempts.

⁸ i. e. its delivery alive or dead.

prisonment of either description for a term which may extend to two years, or with fine, or with both.

Hurt.

Hart. **319.** Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt.

Grievous hurt. **320.** The following kinds of hurt only are designated as 'grievous':—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face¹.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days², in severe bodily pain, or unable to follow his ordinary pursuits.

Voluntarily causing hurt. **321.** Whoever does any act³ with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said 'voluntarily⁴ to cause hurt⁵.'

Voluntarily causing grievous hurt. **322.** Whoever voluntarily⁴ causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said 'voluntarily to cause grievous hurt.'

Explanation.—A person is not said voluntarily⁴ to cause

¹ caused, for example, by branding the cheeks with a hot iron, 1 Bom. H. C. 101.

² A portion of a day counts as a day. Where *A* was so much injured that he had to go to hospital, but left it perfectly cured on the twentieth day after the hurt, Scotland C.J. held that this day would count as one of the twenty, Mayne, P. C. 277.

³ This includes an illegal omission, sec. 32.

⁴ Sec. 39.

⁵ Where *B* was suffering from spleen disease, and *A* struck *B* intentionally, but without the intention of causing death or such bodily injury as was likely to cause death or the knowledge that he was likely by his act to cause death, and by his act caused *B*'s death, *A* has only committed the offence of voluntarily causing hurt, 2 All. 522, 766; 8 Suth. Cr. 29. And see 3 All. 597.

grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily¹ to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind².

Illustration.

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

323. Whoever, except in the case provided for by section 334³, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both⁴.

Punishment for voluntarily causing hurt.

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal⁵, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both⁶.

Voluntarily causing hurt by dangerous weapons or means.

325. Whoever, except in the case provided by section 335, voluntarily causes grievous hurt, shall be punished with im-

Punishment for voluntarily

¹ Sec. 39.

² Where death is caused, 'but there is neither intention, knowledge, nor likelihood that the injury inflicted will or can cause death, the offence would be "voluntarily causing grievous hurt" under sec. 322, or what under the old law would be called manslaughter,' 2 *Suth. Cr.* 39, 40.

³ Except also where the causing hurt is lawful, as when a parent corrects his child, a schoolmaster his pupil, a master his apprentice (*Act XIX of 1850*), or a ship-captain his sailors (*The Agincourt*, 1 *Hagg. Ad.*

271, 272, per Lord Stowell).

⁴ Offences under this section may be tried summarily, *Cr. P. C. secs.* 260, 261. And they may be compounded, *ibid.* sec. 345.

⁵ Sec. 47.

⁶ 7 *Mad. H. C. Rulings*, xi. Charges and findings under this section need not contain a negation that the hurt was caused on grave and sudden provocation, 4 *Mad. H. C. Rulings*, v. Offences under this section may be compounded with the permission of the Court (*Cr. P. C. sec.* 345).

causing
grievous
hurt.

prisonment of either description for a term which may extend to seven years, and shall also be liable to fine¹.

Volunta-
rily causing
grievous
hurt by
dangerous
weapons or
means.

326. Whoever, except in the case provided by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal², shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Volunta-
rily causing
hurt to ex-
tort prop-
erty or to
compel
to illegal
act.

327. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer³, any property or valuable security⁴, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal⁵ or which may facilitate the commission of an offence⁶, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing
hurt by
means of
poison, &c.

328. Whoever administers to, or causes to be taken by, any person any poison or any stupefying, intoxicating, or unwholesome drug or other thing⁷, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence⁸, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine⁹.

¹ If A is charged under this section and proves that he acted on grave and sudden provocation he may be convicted under sec. 335 (Cr. P. C. sec. 238).

² Sec. 47.

³ By blood-relationship, marriage, service, or even friendship, M. & M. 294.

⁴ Sec. 30.

⁵ Sec. 43.

⁶ Sec. 40, cl. 2.

⁷ i. e. other unwholesome thing, 1 Suth. Cr. 7.

⁸ Sec. 40, cl. 2.

⁹ 4 Suth. Cr. 4. A is the owner of date-trees from which the toddy is constantly stolen. To detect the thief he puts into his toddy-pots the juice of the milk-bush, knowing that if drunk by a human being such juice would cause hurt to the drinker. The

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security¹, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which may facilitate the commission of an offence², shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to extort property or to compel illegal act.

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence³ or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security¹, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security¹, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Voluntarily causing hurt to extort confession, or compel restoration of property.

Illustrations.

(a) *A*, a police officer, tortures *Z* in order to induce *Z* to confess that he committed a crime. *A* is guilty of an offence under this section.

(b) *A*, a police officer, tortures *B* to induce him to point out where certain stolen property is deposited. *A* is guilty of an offence under this section.

(c) *A*, a revenue officer, tortures *Z* in order to compel him to pay certain arrears of revenue due from *Z*. *A* is guilty of an offence under this section.

(d) *A*, a zamindár, tortures a ryot in order to compel him to pay his rent. *A* is guilty of an offence under this section.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information

Voluntarily causing grievous hurt to

toddy in one of the pots is drunk by, and causes hurt to, *B*. *A* is guilty of an offence under this section, 5 Bom. H. C., Cr. Ca. 59.

¹ Sec. 30.

² Sec. 40, cl. 2.

³ Sec. 40, cl. 2. The application of

boiling oil for the purpose of eliciting a confession of witchcraft does not fall under this section (13 Suth. Cr. 23); but it is immaterial whether the offence or misconduct confessed has, or has not, been committed, 20 Suth. Cr. 41.

extort confession, or to compel restoration of property.

which may lead to the detection of an offence¹ or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security², or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security³, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt to deter public servant.

332. Whoever voluntarily causes hurt to any person being a public servant³ in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Voluntarily causing grievous hurt to deter public servant.

333. Whoever voluntarily causes grievous hurt to any person being a public servant³ in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt on provocation.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both⁴.

¹ Sec. 40, cl. 2.

² Sec. 30.

³ Sec. 21.

⁴ Voluntarily causing hurt to Z on grave and sudden provocation, where Z gave the provocation, is chargeable as an offence under this section, 1 Bom. H. C. 17. But where A, irri-

tated by grave and sudden provocation received from B, voluntarily causes hurt to Z, A is chargeable under sec. 323 or 324.

As to trying offences under sec. 334 summarily, see Cr. P. C. sec. 261. They may be compounded, *ibid.* sec. 345.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Causing grievous hurt on provocation.

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300¹.

336. Whoever does any act so rashly or negligently² as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both³.

Rashness or negligence endangering life or personal safety of others.

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both³.

Causing hurt by such rashness or negligence.

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both³.

Causing grievous hurt by such rashness or negligence.

Wrongful Restraint and Wrongful Confinement.

339. Whoever voluntarily⁴ obstructs⁵ any person so as to prevent that person from proceeding in any direction in which

Wrongful restraint.

¹ Offences under this section may be compounded with the permission of the Court, Cr. P. C. sec. 345.

² As to rashness and negligence see note to sec. 304 A.

³ Sending a box or vessel containing dynamite or nitric acid (e.g.) by a carrier, without giving notice of its contents, may come within this section. But conveying passengers for hire in an unsafe ferry-boat is an

offence under sec. 282, not sec. 336. As to trying summarily offences under sec. 336, see Cr. P. C. 261.

⁴ Sec. 39.

⁵ A may obstruct B by causing it to appear to that other impossible, difficult, or dangerous to proceed, as well as by causing it actually to be impossible, difficult, or dangerous for B to proceed, M. & M. 301.

that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way¹ over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z².

Wrongful
confinement.

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person³.

Illustrations.

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

Punishment for
wrongful
restraint.

341. Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both⁴.

Punishment for
wrongful
confinement.

342. Whoever wrongfully confines⁵ any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both⁶.

¹ As to these ways see the Easements Act, V of 1882, *infra*.

² Other illustrations are :—

A illegally omits to take proper order with a furious buffalo in his possession, and thus voluntarily deters Z from passing along a road along which Z has a right to pass.

A threatens to set a savage dog at Z, if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path.

In the last illustration, if the dog is not really savage, but A voluntarily causes B to think that it is savage

and thereby prevents Z going along the path, in each of these cases A wrongfully restrains Z.

³ 2 Mad. H. C. 396; 5 Mad. H. C. App. xxiv. The duration of the wrongful restraint is immaterial, except with reference to the extent of punishment, 6 Suth. Cr. 88.

⁴ As to trying offences under this section summarily, see Cr. P. C. sec. 261. They may be compounded, *ibid.* sec. 345.

⁵ Sec. 340.

⁶ Offences under this section may be compounded, Cr. P. C. sec. 345.

343. Whoever wrongfully confines any person for three days or more¹, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Wrongful confinement for three or more days.

344. Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine². Wrongful confinement for ten or more days.

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued³, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of imprisonment to which he may be liable under any other section of this Code. Wrongful confinement of person for whose liberation writ has issued.

346. Whoever wrongfully confines any person in such manner as to indicate an intention⁴ that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant⁵, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement⁶. Wrongful confinement in secret.

347. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security⁷, or of constraining the person confined, or any person interested in such person, to do anything illegal or to give any information which may facilitate the commission of an act. Wrongful confinement for purpose of extorting property or compelling illegal act.

¹ The words 'less than ten' are not to be understood here, M. & M. 303.

² A sentence of fine alone cannot be inflicted under this section, 1 Bom. H. C. 39.

³ See Cr. P. C. sec. 491, cl. (3).

⁴ This intention seems to be a part of the offence punishable under this section (M. & M. 305); and the con-

finement must be such as to indicate an intention that the person confined should not be discovered, 9 Cal. 221.

⁵ Sec. 21.

⁶ Where the confinement is an integral part of the offence of kidnapping, it should not form the subject of a separate conviction, 6 N. W. P. 293.

⁷ Sec. 30.

offence¹, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful
confinement for
purpose
of extorting
confession,
or compelling
restoration of
property.

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence¹ or misconduct, or for the purpose of constraining the person confined, or any person interested in the person confined, to restore or to cause the restoration of any property² or valuable security³, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property² or valuable security³, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Criminal Force and Assault.

Using
force.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion or change of motion or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling; provided that the person causing the motion, or change of motion or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion, or change, or cessation of motion takes place without any further act on his part or on the part of any other person.

Thirdly.—By inducing any animal⁴ to move, to change its motion, or to cease to move.

Using
criminal
force.

350. Whoever intentionally uses force to any person, without that person's consent⁵, in order to the committing of

¹ Sec. 40, cl. 2.

² whether moveable or immoveable.

³ Sec. 141.

⁴ Sec. 47.

⁵ Sec. 90.

any offence¹, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force² to that other.

Illustrations.

(a) *Z* is sitting in a moored boat on a river. *A* unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here *A* intentionally causes motion to *Z*, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. *A* has therefore intentionally used force to *Z*; and if he has done so without *Z*'s consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to *Z*, *A* has used criminal force to *Z*.

(b) *Z* is riding in a chariot. *A* lashes *Z*'s horses, and thereby causes them to quicken their pace. Here *A* has caused change of motion to *Z* by inducing the animals to change their motion. *A* has therefore used force to *Z*; and if *A* has done this without *Z*'s consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z*, *A* has committed criminal force to *Z*.

(c) *Z* is riding in a palanquin. *A*, intending to rob *Z*, seizes the pole and stops the palanquin. Here *A* has caused cessation of motion to *Z*, and he has done this by his own bodily power. *A* has therefore used force to *Z*: and as *A* has acted thus intentionally without *Z*'s consent, in order to the commission of an offence, *A* has used criminal force to *Z*.

(d) *A* intentionally pushes against *Z* in the street. Here *A* has by his own bodily power moved his own person so as to bring it into contact with *Z*. He has therefore intentionally used force to *Z*, and if he has done so without *Z*'s consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(e) *A* throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with *Z*, or with *Z*'s clothes, or with something carried by *Z*, or that it will strike water and dash up the water against *Z*'s clothes or something carried by *Z*. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with *Z* or *Z*'s clothes, *A* has used force to *Z*; and if he did so without *Z*'s consent, intending thereby to injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(f) *A* intentionally pulls up a woman's veil. Here *A* intentionally uses force to her; and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

¹ Sec. 40.

² The expression is used also in sec. 141, cl. 1.

(g) *Z* is bathing. *A* pours into the bath water which he knows to be boiling. Here *A* intentionally, by his own bodily power, causes such motion in the boiling water as brings that water into contact with *Z*, or with other water so situated that such contact must affect *Z*'s sense of feeling: *A* has therefore intentionally used force to *Z*; and if he has done this without *Z*'s consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to *Z*, *A* has used criminal force.

(h) *A* incites a dog to spring upon *Z*, without *Z*'s consent. Here, if *A* intends to cause injury, fear or annoyance to *Z*, he uses criminal force to *Z*¹.

Assault.

351. Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault².

Illustrations.

(a) *A* shakes his fist at *Z*, intending or knowing it to be likely that he may thereby cause *Z* to believe that *A* is about to strike *Z*. *A* has committed an assault.

(b) *A* begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause *Z* to believe that he is about to cause the dog to attack *Z*. *A* has committed an assault upon *Z*.

(c) *A* takes up a stick, saying to *Z*, 'I will give you a beating.' Here, though the words used by *A* could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

Punish-
ment for
using cri-
minal force
otherwise
than on

352. Whoever assaults or uses criminal force³ to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or

¹ So where *A* disputing with *B* about his hire gives *B* a push which causes him to fall. In the fall *B* breaks his toe and consequently dies of tetanus. *A* has used criminal force, but he has not committed culpable homicide, 1 Mad. 224.

An act permitted by law cannot, of course, amount to criminal force, e. g.

the moderate chastisement of a child by its parent or teacher.

² 1 Bom. H. C. 205. Conversely, words showing that no harm is intended may deprive gestures of any wrongful character (*Tuberville v. Savage*, 1 Mod. 3).

³ Sec. 350.

with fine which may extend to five hundred rupees, or with grave provocation both ¹.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence,—or

If the provocation is given by anything done in obedience to the law, or by a public servant² in the lawful exercise of the powers of such public servant,—or

If the provocation is given by anything done in the lawful exercise of the right of private defence³.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact⁴.

353. Whoever assaults or uses criminal force to any person being a public servant² in the execution of his duty as such public servant⁵, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Using criminal force to deter public servant.

354. Whoever assaults or uses criminal force to any woman⁶, intending to outrage or knowing it to be likely that he will thereby outrage her modesty⁷, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁸. Assault or criminal force with intent to outrage woman's modesty.

¹ One who is tried for, and acquitted of, the offence of assault under this section, cannot again, upon the same complaint, be tried for causing hurt, 7 Ben. Appx., 25.

² Sec. 21.

³ Secs. 96–106.

⁴ As to trying offences under this section summarily, see Cr. P. C. sec. 261. They may be compounded, *ibid.* sec. 345.

⁵ 7 N. W. P. 209, where it was held that resistance to constables who attempted to search a house without the proper warrant was not punishable under this section.

⁶ Sec. 10.

⁷ It would be an outrage to the modesty of one woman to do to her what would be thought nothing of by another, M. & M. 311.

⁸ And see the Whipping Act, sec. 4, *supra*, pp. 105–106. Where A tries to have sexual intercourse with a girl under ten years of age, her consent is immaterial. For the attempt, if successful, would be rape (sec. 375), and therefore if unsuccessful would be punishable under sec. 511, Mayne, P. C. 295. A prisoner may be convicted under sec. 354, though acquitted of an attempt to commit rape, 5 Bom. 403.

Assault or criminal force with intent to dishonour.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person¹, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both².

Assault or criminal force in attempt to commit theft of property carried by person.

356. Whoever assaults or uses criminal force to any person, in attempting to commit theft³ on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force in attempt wrongfully to confine.

357. Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine⁴ that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Assault or criminal force on grave provocation.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both⁵.

Explanation.—The last section is subject to the same explanation as section 352.

Kidnapping, Abduction, Slavery and Forced Labour.

Kidnaping.

359. Kidnapping is of two kinds ; kidnapping from British India⁶, and kidnapping from lawful guardianship.

Kidnaping from British India.

360. Whoever conveys any person beyond the limits of British India⁶ without the consent⁶ of that person or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from British India⁷.

Kidnaping from lawful

361. Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a

¹ Intention to dishonour may be inferred when the assault or criminal force is by grossly insulting means, such as kicking, pulling the nose, etc., M. & M. 312.

² Offences under this section may be compounded, Cr. P. Code, sec. 345.

³ Sec. 378.

⁴ Sec. 340.

⁵ Sec. 15.

⁶ Sec. 90.

⁷ Where the offender is the subject of an independent state, see 1 Suth. Cr. 39.

female¹, or any person of unsound mind, out of the keeping of the lawful guardian² of such minor or person of unsound mind, without the consent³ of such guardian, is said to kidnap such minor or person from lawful guardianship⁴.

Explanation.—The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person⁴.

Exception.—This section does not extend to the act of any person who in good faith⁵ believes himself to be the father of an illegitimate child, or who in good faith⁵ believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

¹ The words 'or under sixteen years if a female' were introduced to make the section consistent with 9 Geo. IV, c. 74.

² i. e. the guardianship of a person who is lawfully entrusted with the care or custody of the minor abducted, 2 N. W. P. 287. A child of ten years of age is, *prima facie*, subject to guardianship.

As to the guardianship of European British minors see Act XIII of 1874. As to other minors see the laws relating to the Courts of Wards, and Acts XL of 1858 and XX of 1864. For the jurisdiction of the High Courts as to infants see the Charter of 26th March, 1774, sec. 25, and the letters patent of 28th December, 1865, § 17, and 17th March, 1866, § 12.

The mother of an illegitimate child is its proper and natural guardian during the period of nurture, and if during that period the mother dies, having committed the child to the care of a person who accepts the trust, such person is 'lawfully entrusted' within the meaning of this explanation, 8 Cal. 974, where the mother was either an European or East Indian.

According to Hindú law the father of a legitimate child is its lawful guardian, 8 Cal. 969, and his rights as such are not lost by his conversion to Christianity, Act XXI of 1850, and 5 Suth. Civ. R. 235. But in the case of a Kulin Brahman (who sometimes has 50 or 60 wives) it has been said that he is not such a 'natural guardian' of his daughter as her mother is, 3 Suth. Civ. R. 194. The

mother is the natural guardian of a bastard, Mayne, H. L. § 192. In the case of Muhammadans a mother is entitled even as against the father to the custody of her legitimate sons and daughters up to seven years, and further in the case of daughters, according to the Sunni law, up to puberty, 2 Hyde, 63; 2 Suth. Civ. R. 76; 2 All. 72. As to the inability of certain eunuchs to act as guardians, see Act XXVII of 1871, sec. 29.

A child playing about on a public road is still under the lawful guardianship of its parent or other relative living close by, 7 Suth. Cr. 98.

Omitting to inquire whether the child had a guardian or not is no defence, 3 Bom. 178. Nor is the fact that a betrothal, not amounting to a marriage or transfer of guardianship, has taken place between the accused and the girl kidnapped, 4 Suth. Cr. 7.

As to the committees or guardians of persons of unsound mind, see Acts XXXIV and XXXV of 1858, and the Charter and Letters Patent above referred to.

³ Sec. 90.

⁴ The minor's consent is immaterial and force or fraud forms no element of the offence, 2 Suth. Cr. 5; 3 Suth. Cr. 15; 7 Suth. Cr. 54. Sec. 361 would apply to the kidnapping of married females under sixteen.

The offence described in sec. 363 is included in that described in sec. 369, 8 Suth. Cr. 35, col. 2.

Kidnapping is compoundable, Cr. P. Code, sec. 345.

⁵ Sec. 52.

Abduction. **362.** Whoever by force¹ compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person².

**Punish-
ment for
kidnap-
ping.** **363.** Whoever kidnaps any person from British India³ or from lawful guardianship⁴, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Kidnap-
ping or ab-
ducting in
order to
murder.** **364.** Whoever kidnaps or abducts any person in order that such person may be murdered⁵, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(a) *A* kidnaps *Z* from British India, intending or knowing it to be likely that *Z* may be sacrificed to an idol. *A* has committed the offence defined in this section.

(b) *A* forcibly carries or entices *B* away from his home in order that *B* may be murdered. *A* has committed the offence defined in this section.

**Kidnap-
ping or ab-
ducting
with intent
to confine.** **365.** Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined⁶, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Kidnap-
ping or ab-
ducting
woman to
compel
marriage,
&c.** **366.** Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine⁷.

¹ Sec. 349.

² This merely defines the word 'abducts,' which occurs in secs. 364-367, 369, and 'abducted,' sec. 368.

³ Sec. 15.

⁴ See note 2, p. 229.

⁵ Sec. 300.

⁶ Sec. 340.

⁷ Where a procuress induced a married woman of 20 to leave her husband and become a prostitute, no conviction under sec. 366 could be maintained; but the procuress might be convicted under sec. 498, 1 Suth. Cr. 45. Where *A* takes a girl of 11 years of age out of the keeping of her

367. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt¹ or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine².

Kidnap-
ping or ab-
ducting in
order to
subject to
grievous
hurt, &c.

368. Whoever³, knowing that any person has been kidnapped, or has been abducted, wrongfully conceals⁴ or keeps such person in confinement, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge or for the same purpose as that with or for which he conceals or detains such person in confinement.

Wrong-
fully con-
cealing or
confining
kidnapped
person.

369. Whoever kidnaps or abducts any child under the age of ten years, with the intention of taking dishonestly⁵ any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnap-
ping or
abducting
child with
intent
to steal.

370. Whoever imports, exports, removes, buys⁶, sells, or disposes of any person as a slave⁷, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term

Importing,
buying, or
selling
slaves.

lawful guardian and offers her for sale in marriage to *Z*, and *B* wrongfully conceals her, *A* may be convicted under sec. 363 and *B* under sec. 368; but separate convictions of *A* and *B* under sec. 366 would be quashed, 7 *Suth. Cr.* 36.

¹ Sec. 320.

² Offences under secs. 367-371 committed by any subject of Her Majesty or of an allied Prince, upon the high seas or in Asia or Africa, are punishable in British India under the Slave Trade Act, 39 & 40 *Vic. cap.* 46, sec. 1.

³ other than the kidnapper or abductor, 6 *Suth. Cr.* 17, col. 1.

⁴ The mere fact of a girl being re-

ceived into a house and retained there by the owner, even after he may have become aware or found reason to believe that she had been kidnapped, does not amount to 'concealment' of her, unless an intention of keeping her out of view be apparent, 5 *N. W. P.* 133; and see *ibid.* 189.

⁵ Sec. 24.

⁶ 7 *Mad.* 277. 'Slave' here and elsewhere in this chapter includes every one over whose liberty another claims absolute power, *ibid.*, or in whose person another claims a right of property, 2 *All.* 731.

⁷ 2 *All.* 723. The section seems to ignore Act V of 1843.

which may extend to seven years, and shall also be liable to fine ¹.

Habitual
dealing in
slaves.

371. Whoever habitually imports, exports, removes, buys, sells, traffics, or deals in slaves, shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Selling
minor for
purposes of
prostitution,
&c.

372. Whoever sells, lets to hire, or otherwise disposes of ² any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose ³, or knowing it to be likely that such minor will be employed or used for any such purpose ⁴, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ⁵.

Buying
minor for
purposes of
prostitution.

373. Whoever buys, hires, or otherwise obtains possession of ⁶ any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ⁷.

¹ Slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent or guardian, or a jailor, 3 N. W. P. 148.

² That is to say, making over to a person either in perpetuity, or for a term, for a consideration, or otherwise transferring the possession of a minor, 6 Ben. Appx., 36, per Jackson J.

³ The purpose must be unlawful as well as immoral; otherwise under the exception to sec. 361.

The morality referred to in secs. 372, 373 is that which is generally accepted by the civilised world, not what is moral according to the subjective opinion of the judge.

⁴ 6 Bom. H. C., Cr. Ca. 60.

⁵ To constitute an offence under this section, it is not necessary that there should have been a disposal

tantamount to a transfer of possession or control over the minor's person, 6 Bom. H. C., Cr. Ca. 60 (where a girl was dedicated to the service of a Hindú temple), followed in 1 Mad. 164 (where a girl was wedded to an idol). See also 5 Mad. H. C. 415, where a minor was enrolled among the dancing girls of a pagoda.

⁶ 'Obtaining possession' does not here mean merely having sexual intercourse. The section intends to punish the obtaining complete possession and control of the minor's person, by buying, hiring, or otherwise, with the knowledge or intent, that, by the effect of such possession or control, the minor would or should afterwards be employed or used for either of the purposes stated, 5 Mad. H. C. 473, followed in 7 N. W. P. 295. Whether the obtaining possession must be from a third person or may be from the minor herself seems doubtful.

⁷ 7 Suth. Cr. 55, col. 2.

374. Whoever unlawfully compels¹ any person to labour² Unlawful against the will of that person, shall be punished with im- compulsory prisonment of either description for a term which may extend labour. to one year, or with fine, or with both³.

Rape.

375. A man is said to commit 'rape' who, except in the Rape. case hereinafter excepted, has sexual intercourse with a woman⁴ under circumstances falling under any of the five following descriptions:—

First.—Against her will⁵.

Secondly.—Without her consent⁶.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt⁷.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married⁸.

Fifthly.—With or without her consent, when she is under 12 ten years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape⁹.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape¹⁰.

¹ The compulsion employed must be such as amounts in law to duress and must at least be as great as would vitiate a contract, Mayne, P. C. 306. Compulsory bodily labour is lawful under some local laws: see in the Madras Presidency, Act I of 1858; in Burma, Act XIII of 1877.

² Bodily labour, probably, is meant.

³ Offences under this section may be compounded, Cr. P. C. sec. 345. But amends cannot be awarded, 5 Suth. Cr. 1, col. 2.

⁴ Sec. 10.

⁵ where she is in possession of her senses.

⁶ where she is insensible from drink or any other cause, or so imbecile as to be incapable of rational assent, M. & M. 324. The mere cessation of a genuine resistance is not sufficient evidence of consent (1

Suth. Cr. 21), as to which see sec. 90. Where it is necessary to acquit the prisoner on the ground of consent, he cannot be convicted of adultery, 1 Morl. Dig. 176.

⁷ Sec. 319.

⁸ So now in England; Criminal Law Amendment Act, 1885, sec. 4. Where there has been intimacy between the prisoner and the woman there will always be strong reason to suspect that the allegation of such belief was made to obviate the consequences of detection, Mayne, P. C. 308.

⁹ It is not necessary to prove emission. Where penetration is not proved the prisoner may be convicted of an attempt, Cr. P. C. sec. 238.

¹⁰ But, as in Lord Audley's case, he may be guilty of abetting a rape committed on his wife by others.

Punish-
ment for
rape.

376. Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ¹.

Unnatural Offences.

Unnatural
offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man ², woman ³, or animal ⁴, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ⁴.

Explanation.—Penetration ⁵ is sufficient to constitute the carnal intercourse necessary to the offence described in this section ⁶.

¹ And see the Whipping Act, sec. 4, *supra*, p. 106. The social position of the woman should not guide the Court to the measure of punishment to be inflicted on the man. The punishment should be proportioned to the greater or less atrocity of the crime, the conduct of the criminal, and the defenceless state of the woman, 6 *Suth. Cr.* 59, per Seton-Karr J.

² Sec. 10.

³ Sec. 47.

⁴ And see the Whipping Act, sec. 4.

⁵ of any part of the body.

⁶ It is not necessary to prove emission, or that the act was against the will or without the consent of the person upon whom the offence was committed. If that person has consented, both are guilty of the offence, *M. & M.* 326.

It is not enough for a conviction under this section merely to prove that the accused is an habitual sodomite, 6 *All.* 204.

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY ¹.

Theft.

378. Whoever, intending to take dishonestly² any move-^{Theft}able property³ out of the possession⁴ of any person⁵ without^{defined.} that person's consent⁶, moves that property in order to such taking⁷, is said to commit theft⁸.

¹ As to the trial of persons previously convicted under this chapter, see Cr. P. C. sec. 348.

² Sec. 24. A Hindú woman, therefore, who removes from the possession of her husband, and without his consent, her *pallá* or *stridhana*, cannot be convicted of theft, 8 Bom. H. C., Cr. Ca. 11. But a Muhammadan wife is not so identified with her husband that she cannot be convicted of theft of his property, 6 Bom. H. C., Cr. Ca. 9. Where *A*, acting *bond fide* in the interest of his master and finding fishermen poaching on his master's fishery, took charge of their nets, and kept possession of them, pending his master's orders, it was held that *A* had not committed theft, 6 Suth. Cr. 79. And there is no theft where the property is taken by mistake or under a *bond fide* claim of right to possess them, or with a *bond fide* belief that the owner's implied consent was given; Savigny, cited by Mayne, p. 314.

³ Sec. 22.

⁴ See sec. 27, and p. 56, *supra*. Possession need not be lawful. If *A* lends *B* a horse for a week, and *B* wrongfully retains it after the week has expired, there may be a theft of the horse from *B*. And so if *B* had stolen the horse, *M. & M.* 336.

⁵ It is enough if he holds by an apparent title, or even an assertion of title not plainly illusory, 11 Bom. 137, following *Cape v. Scott*, L. R., 9 Q. B. 277 ('where there is a colour

of right a person believing himself aggrieved shall not take the law into his own hands'). Fish living in a creek or in the open irrigation tanks of Southern India are not in 'possession' in such a sense as to render their capture and removal a theft, even though the right of capturing them has been sold or leased by Government to some person other than the accused, 5 Mad. 390. But when Government placed guards round a swamp in which salt was spontaneously formed, it was held that such possession of the salt had been taken as would cause its removal from the swamp against the will of Government, and with the intention of obtaining an unlawful gain, to be theft, 4 Mad. 228. So when the salt was formed in a creek, which was under the supervision of a customs-officer, 10 Bom. H. C. 74.

⁶ Sec. 90.

⁷ Any removal, however small, will be enough, even though the mover never had the property in his power.

⁸ This does not include the case where one joint proprietor (e.g. the member of a Hindú undivided family) merely takes into his own sole possession property belonging to himself and his co-proprietors, which had previously been in their joint custody, 6 Ben. Appx. 133. But if he took the property with the intention of causing wrongful gain to himself, it would be theft, Mayne, P. C. 316.

Explanation 1.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth¹.

Explanation 2.—A moving effected by the same act which effects the severance, may be a theft².

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it³.

Explanation 4.—A person, who by any means causes an animal to move⁴, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations.

(a) *A* cuts down a tree on *Z*'s ground, with the intention of dishonestly taking the tree out of *Z*'s possession, without *Z*'s consent. Here, as soon as *A* has severed the tree, in order to such taking, he has committed theft.

(b) *A* puts a bait for dogs in his pocket, and thus induces *Z*'s dog to follow it. Here, if *A*'s intention be dishonestly to take the dog out of *Z*'s possession without *Z*'s consent, *A* has committed theft as soon as *Z*'s dog has begun to follow *A*.

(c) *A* meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

(d) *A*, being *Z*'s servant, and entrusted by *Z* with the care of *Z*'s plate, dishonestly runs away with the plate, without *Z*'s consent. *A* has committed theft⁵.

¹ Where *A* clears a piece of Government land, cutting down and appropriating, without permission, the trees thereon, he may be convicted of mischief as well as theft, as the mischief preceded the theft, which, under Expl. 1, would not be committed until the tree had been detached from the ground, 2 Bom. H. C. 416.

² 5 Mad. H. C. Rulings, xxxvi.

³ For example, if *A* pulls the bung out of a barrel of beer in *Z*'s possession with the intention of dishonestly taking some of the beer without *Z*'s consent, as soon as the beer begins to flow *A* has committed theft,

⁴ Sec. 47.

⁵ Here, so long as *A* was obedient to *Z*'s orders, the plate was in *Z*'s possession, though it was actually in *A*'s charge.

(e) *Z*, going on a journey, entrusts his plate to *A*, the keeper of a warehouse, till *Z* shall return. *A* carries the plate to a goldsmith and sells it. Here the plate was not in *Z*'s possession¹. It could not therefore be taken out of *Z*'s possession, and *A* has not committed theft though he may have committed criminal breach of trust².

(f) *A* finds a ring belonging to *Z* on a table in the house which *Z* occupies. Here the ring is in *Z*'s possession, and if *A* dishonestly removes it, *A* commits theft³.

(g) *A* finds a ring lying on the high road, not in the possession of any person. *A*, by taking it, commits no theft, though he may commit criminal misappropriation of property⁴.

(h) *A* sees a ring belonging to *Z* lying on a table in *Z*'s house. Not venturing to misappropriate the ring immediately for fear of search and detection, *A* hides the ring in a place where it is highly improbable that it will ever be found by *Z*, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here *A*, at the time of first moving the ring, commits theft⁵.

(i) *A* delivers his watch to *Z*, a jeweller, to be regulated. *Z* carries it to his shop. *A*, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of *Z*'s hand, and carries it away. Here *A*, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly⁶.

(j) If *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and *A* takes the watch out of *Z*'s possession with the intention of depriving *Z* of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly⁷.

(k) Again, if *A* having pawned his watch to *Z*, takes it out of *Z*'s possession without *Z*'s consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l) *A* takes an article belonging to *Z* out of *Z*'s possession, without *Z*'s consent, with the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly; *A* has therefore committed theft.

(m) *A*, being on friendly terms with *Z*, goes into *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent, for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that *A* may have conceived that

¹ Because it had been bailed to *A*.

² Sec. 405.

³ Here *Z*'s ring was in *Z*'s possession, as it was on a table in the house occupied by him, and he could exercise physical control over it.

⁴ Sec. 403.

⁵ The intention to take dishonestly

must exist at the time of the moving.

⁶ *A*'s gain is not wrongful (sec. 23).

⁷ This illustration, like illustration (k), shows that a man may commit a theft of his own property. *A* takes dishonestly because he causes wrongful loss to *Z*, who had an interest in the watch.

he had *Z*'s implied consent to use *Z*'s book. If this was *A*'s impression, *A* has not committed theft.

(*n*) *A* asks charity from *Z*'s wife. She gives *A* money, food and clothes, which *A* knows to belong to *Z*, her husband. Here, it is probable that *A* may conceive that *Z*'s wife is authorised to give away alms. If this was *A*'s impression, *A* has not committed theft.

(*o*) *A* is the paramour of *Z*'s wife. She gives *A* valuable property, which *A* knows to belong to her husband *Z*, and to be such property as she has not authority from *Z* to give. If *A* takes the property dishonestly, he commits theft.

(*p*) *A* in good faith¹, believing property belonging to *Z* to be *A*'s own property, takes that property out of *B*'s possession. Here, as *A* does not take dishonestly, he does not commit theft².

Punish-
ment for
theft.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both³.

Theft in
dwelling-
house, &c.

380. Whoever commits theft in any building, tent or vessel⁴, which building, tent or vessel is used as a human dwelling, or for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine⁵.

¹ Sec. 52.

² So if *A*'s sheep stray from his flock into *B*'s flock and *B* by mistake treats them as his own.

A suspecting his bullock to have been poisoned causes its carcase to be buried, *B* digs up the carcase. Here, as *A* had given up all property in, and possession of, the carcase, *B* does not commit theft, 4 Mad. H. C. Rulings, xxx.

A, a chaukidár, thinking he was doing rough justice, takes a woman's cows against her will and divides them among her creditors; *A* has committed theft, 3 Suth. Cr. 2.

Z is dunned by his tailor. *A* a servant of *Z*, without *Z*'s consent, delivers *Z*'s plate to the tailor, telling him to pay himself thereout; *A* has committed theft, 3 Suth. Cr. 4.

A, believing that a certain book belongs to *B* and intending to take it dishonestly out of *B*'s possession without his consent, removes it from *B*'s library: the book in fact belongs to *A*: he has nevertheless committed theft.

A intending to take a pencil dishonestly out of *B*'s possession with-

out his consent, moves it from *B*'s counter, but is unable to carry it off owing to its being tied to the counter: *A* has committed theft, though the pencil has never been in his power.

³ or with whipping, Act VI of 1864, sec. 2. Fine inflicted under sec. 379 may be applied to compensate the loss sustained by the sufferer, Cr. P. Code, sec. 545. Where the value of the property stolen does not exceed Rs. 50, offences under secs. 379, 380, 381 may be tried summarily (ibid. sec. 260).

⁴ Sec. 48.

⁵ or whipping, Act VI of 1864, sec. 2. But the offence under sec. 380 is a distinct offence from that of theft under sec. 378, and is not included under it. Therefore one convicted of 'theft in a dwelling-house' who had previously been convicted of simple theft, is not thereby rendered liable to whipping under Act VI of 1864, sec. 3; see 7 Bom. H. C., Cr. Ca. 68. Theft by constables from the house they were employed to guard is punishable under sec. 380, not sec. 409.

That the property in stolen goods

381. Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession¹ of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine².

Theft by clerk or servant of property in possession of master.

382. Whoever commits theft, having made preparation for causing death or hurt³ or restraint⁴, or fear of death or of hurt or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine⁵.

Theft after preparation made for causing death or hurt.

Illustrations.

(a) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z, in case Z should resist. A has committed the offence defined in this section.

(b) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Extortion.

383. Whoever intentionally puts any person in fear of any injury⁶ to that person or to any other⁷, and thereby

(other than cash, or bills or notes payable to bearer which circulate as cash) remains in the owner, see 1 N. W. P. 298.

¹ See sec. 27, and p. 56, *supra*.

² or whipping, Act VI of 1864, sec. 2. A hired boatman is not a 'servant' under sec. 381; 8 *Suth. Cr.* 32, col. 1. But a *barkandaz* placed in guard over Police Treasury buildings in which was a box containing money is 'employed in the capacity of a servant,' 2 *Suth. Cr.* 55. A buys goods and sends his servant B to receive them; B dishonestly carries them away; B has committed theft.

³ Sec. 319.

⁴ This doubtless means 'wrongful restraint,' sec. 399.

⁵ or whipping, Act VI of 1864, sec. 2. As to the duty of the public to give information of the offence punishable under sec. 382, see *Cr. P. C.* sec. 44.

⁶ Sec. 44. Reading sec. 383 with sec. 390, it seems that the threatened injury referred to in the former section includes every injury, present or future, except instant death, instant hurt, or instant wrongful restraint. A criminal charge may be 'injury' within the meaning of this section, and Norman J. held that extortion may be equally committed whether the charge be true or false, 7 *Suth. Cr.* 28.

⁷ No tie of relationship etc. is requisite, *M. & M.* 345.

dishonestly induces the person so put in fear to deliver¹ to any person any property² or valuable security³, or anything signed or sealed which may be converted into a valuable security, commits 'extortion⁴.'

Illustrations.

(a) *A* threatens to publish a defamatory libel⁵ concerning *Z*, unless *Z* gives him money. He thus induces *Z* to give him money. *A* has committed extortion.

(b) *A* threatens *Z* that he will keep *Z*'s child in wrongful confinement⁶, unless *Z* will sign and deliver to *A* a promissory note binding *Z* to pay certain monies to *A*. *Z* signs and delivers the note. *A* has committed extortion.

(c) *A* threatens to send club-men to plough up *Z*'s field, unless *Z* will sign and deliver to *B* a bond binding *Z* under a penalty to deliver certain produce to *B*, and thereby induces *Z* to sign and deliver the bond. *A* has committed extortion.

(d) *A*, by putting *Z* in fear of grievous hurt⁷, dishonestly induces *Z* to sign or affix his seal to a blank paper, and deliver it to *A*. *Z* signs and delivers the paper to *A*. Here, as the paper so signed may be converted into a valuable security, *A* has committed extortion⁸.

Punish-
ment for
extortion.

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Putting
in fear of
injury in
order to

385. Whoever, in order to the committing of extortion, puts any person in fear or attempts to put any person in fear of any injury⁹, shall be punished with imprisonment of either

¹ Delivery is essential. Where, therefore, *A* and *B*, falsely alleging that they were Government officials, stopped *Z*'s boat and plundered it, *Z* through fear of wrongful restraint making no resistance, *A* and *B* were guilty of robbery, not extortion, 5 *Suth. Cr.* 19-20.

² Here, as in the definitions of criminal breach of trust and cheating, 'property' seems to include immoveable as well as 'moveable property.'

³ *Sec.* 30.

⁴ It is not necessary that the threat should be used, and the property received, by one and the same individual. It may be a matter of arrangement between several persons that the threat should be used by some, and the property received by others; and they would all be guilty of extortion, 2 *Bom. H. C.* 418,

where *Couch C.J.* added that it would not be necessary, under such circumstances, to charge the receivers with abetment, although that might be done.

⁵ *Sec.* 499.

⁶ *Sec.* 340.

⁷ *Sec.* 320.

⁸ *A* having bought from Government the right of carrying any firewood he might find lying on the ground in a certain jungle, threatens to detain a cartload of firewood which *B* has collected in the jungle and is taking to his home, and thereby induces *B* to pay him money as the price of the wood. Here *A* has not committed extortion, as there was no such fear of injury as is contemplated by *sec.* 383, nor was the money given by *B* in consequence of any such fear, 3 *Bom. H. C., Cr. Ca.* 45.

⁹ *Sec.* 44.

description for a term which may extend to two years, or with fine, or with both. commit extortion.

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt¹ to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Extortion by putting in fear of death or grievous hurt.

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt¹ to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Putting in fear of death or grievous hurt, in order to commit extortion.

388. Whoever commits extortion by putting any person in fear of an accusation² against that person or any other, of having committed or attempted to commit any offence³ punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years⁴, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be one punishable under section 377, may be punished with transportation for life⁵. Extortion by threat of accusation of offence punishable with death or transportation &c.

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation against that person or any other, of having committed, or attempted to commit, an offence³ punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years⁴, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be punishable under section 377, may be punished with transportation for life⁵. Putting in fear of accusation of such offence, in order to commit extortion.

¹ Sec. 320.

² i. e. a false charge before a magistrate or other public authority.

³ Sec. 40, cl. 2.

⁴ See p. 25, supra.

⁵ or with whipping, Act VI of 1864, sec. 2.

Robbery and Dacoity.

Robbery. 390. In all robbery there is either theft¹ or extortion.

When theft is robbery. Theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end², voluntarily³ causes or attempts to cause to any person death or hurt⁴ or wrongful restraint⁵, or fear of instant death or of instant hurt or of instant wrongful restraint.

When extortion is robbery. Extortion is 'robbery,' if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint⁶ to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint⁷.

Illustrations.

(a) A holds Z down, and fraudulently⁸ takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has

¹ The act must be done dishonestly (sec. 24), and see 3 Mad. H. C. 254.

² A having committed theft of B's goods finds himself observed, abandons the goods and runs away, throwing stones at B to prevent pursuit. Here A has not committed robbery, Mad. H. C. Pro., cited Mayne, P. C. 329.

³ Sec. 39.

⁴ Sec. 319.

⁵ Sec. 339.

⁶ Threats of future death, hurt or wrongful restraint would not be enough.

⁷ This explanation was inserted to meet the case where the offender utters threats, not in the actual presence, but in the hearing, of the person put in fear.

⁸ Sec. 25.

extorted the purse from *Z*, by causing *Z* to be in fear of instant hurt to the child who is there present. *A* has therefore committed robbery on *Z*.

(*d*) *A* obtains property from *Z* by saying—'Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees.' This is extortion, and punishable as such: but it is not robbery, unless *Z* is put in fear of the instant death of his child¹.

391. When five or more persons conjointly commit or attempt to commit a robbery², or where the whole number of persons conjointly committing or attempting to commit a robbery², and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting, or aiding, is said to commit 'dacoity.'

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery be committed on the highway³ between sunset and sunrise⁴, the imprisonment may be extended to fourteen years⁵.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine⁵.

394. If any person, in committing or in attempting to commit robbery, voluntarily causes hurt⁶, such person, and any other person jointly concerned⁷ in committing or attempting to commit such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine⁵.

¹ *A* snatches at a sword while it is hanging at *Z*'s side, whereupon *Z* seizes the scabbard. A struggle ensues between them in which *A* draws the sword and takes it away. Here *A* has committed theft but not robbery, for he has not caused or attempted to cause death, hurt, wrongful restraint or fear. In England his crime would have been robbery; 2 Russ. 901, cited by Mayne, P. C.

² 'robbery' (sec. 390), not house-breaking by night or any other such offence, Suth. 1864, Cr. 39.

³ Any road, street, path etc. in public use, M. & M. 353-4.

⁴ This no doubt means 'after sunset and before sunrise,' as in sec. 444.

⁵ And see the Whipping Act, sec. 4, supra, p. 106. As the offence defined in sec. 391 is included in sec. 394, a prisoner who has committed both offences as part of the same transaction should be sentenced under sec. 394 only, 2 Suth. Cr. 1.

As to the duty of the public to give information of offences punishable under secs. 392-399 and 402, see Crim. P. C. sec. 44.

⁶ Sec. 321.

⁷ Secs. 34, 37, 114.

Punish-
ment for
dacoity.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years¹, and shall also be liable to fine².

Dacoity
with
murder.

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder³ in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine⁴.

Robbery
or dacoity,
with at-
tempt to
cause death
or grievous
hurt.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt⁵ to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender⁶ shall be punished shall not be less than seven years.

Attempt to
commit
robbery
when arm-
ed with
deadly
weapon.
Making
prepara-
tion to
commit
dacoity.

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

399. Whoever makes any preparation⁷ for committing dacoity⁸, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Belonging
to gang of
dacoits.

400. Whoever, at any time after the passing of this Act⁹, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term

¹ not more, 6 *Suth. Cr.* 88, col. 2.

² When a body of men attack and plunder a house, the mere fact that the proprietor's family escaped a few minutes before the dacoits forced an entrance does not take the offence out of the purview of sec. 395; 7 *Suth. Cr.* 35 (misprinted 53).

A sentence of fine only under sec. 395 is illegal, 6 *Suth. Cr.* 54.

³ Sec. 300.

⁴ A person who unintentionally commits murder in a dacoity may be punished under this section; but he cannot be separately convicted of murder under sec. 302, and dacoity

with murder under sec. 396, *Suth.*, 1864, *Cr.* 30.

⁵ Sec. 320.

⁶ The liability to enhanced punishment is limited to the offender who actually used etc., or caused etc., or attempted etc., *Mad. H. C. Ruling*, cited *Mayne, P. C.*, p. 332.

⁷ Such as collecting men, arms, provisions.

⁸ Not necessarily any particular dacoity.

⁹ 6th Oct. 1860. Here, as in secs. 311, 401, 402, the Code operates retrospectively.

which may extend to ten years, and shall also be liable to fine.

401. Whoever, at any time after the passing of this Act¹, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine².

402. Whoever, at any time after the passing of this Act¹, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Of Criminal Misappropriation of Property.

403. Whoever dishonestly³ misappropriates or converts to his own use any moveable property⁴, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁵.

Illustrations.

(a) *A* takes property belonging to *Z* out of *Z*'s possession, in good faith believing, at the time when he takes it, that the property belongs to himself. *A* is not guilty of theft; but if *A*, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) *A*, being on friendly terms with *Z*, goes into *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent. Here, if *A* was under the impression that he had *Z*'s implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) *A* and *B* being joint owners of a horse, *A* takes the horse

¹ 6th Oct. 1860.

² 6 Mad. H. C. 120.

³ Sec. 24.

⁴ Sec. 22.

⁵ The mere fact that the prosecutor gave the accused time to make out his accounts and pay the balance due does not vitiate a conviction under this section, 5 Suth. Cr. 56. Criminal misappropriation takes place when the possession has been innocently come by, but by a subsequent

change of intention or from some knowledge which the possessor had not previously the retention becomes fraudulent, 2 N. W. P. 475: 3 N. W. P. 30.

A charge under sec. 403 should specify the person to whom the property belonged, 14 Suth. Cr. 13.

Where it is doubtful on the evidence whether the offence is theft, criminal misappropriation, or criminal breach of trust, sec. 72 applies.

out of *B*'s possession, intending to use it. Here, as *A* has a right to use the horse, he does not dishonestly misappropriate it. But if *A* sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.

A finds a Government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*, pledges it with a banker as a security for a loan, intending at a future time to restore it to *Z*. *A* has committed an offence under this section¹.

Explanation 2.—A person who finds property not in the possession of any other person², and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith³ believe that the real owner cannot be found.

Illustrations.

(a) *A* finds a rupee on the high road, not knowing to whom the rupee belongs. *A* picks up the rupee. Here *A* has not committed the offence defined in this section.

¹ *Z* applies to *A*, a railway booking-clerk, for a railway-ticket, and by mistake gives *A* in payment Rs. 17 instead of 17 pice. *A* discovers the mistake and for a time keeps the Rs. 17, intending to appropriate them; but upon an enquiry being made, returns them to *Z*. *A* has committed an offence under this section, 2 N. W. P. 475.

² As, for example, property wilfully relinquished by the owner, property hidden by the owner since dead when the secret of the hiding-place has perished; property which the owner knows not where to find, M. & M. 361. As to treasure trove, see Act VI of 1878.

³ Sec. 52.

(b) *A* finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) *A* finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. *A* knows that this person can direct him to the person in whose favour the cheque was drawn. *A* appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) *A* sees *Z* drop his purse with money in it. *A* picks up the purse with the intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.

(e) *A* finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to *Z*, and appropriates it to his own use. *A* is guilty of an offence under this section.

(f) *A* finds a valuable ring, not knowing to whom it belongs. *A* sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

404. Whoever dishonestly¹ misappropriates or converts to his own use property², knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Dishonest misappropriation of property possessed by deceased at time of death.

Illustration.

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in this section.

Of Criminal Breach of Trust.

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly³ breach of trust defined.

¹ Sec. 24.

² This does not include immoveable property, 6 Bom. H. C., Cr. Ca. 33.

³ 2 Bom. H. C. 133. See the defi-

nitions (secs. 24, 23) of 'dishonestly,' 'wrongful gain,' and 'wrongful loss.' Where the pledgee of a turban wore it, and thus caused its deterioration,

misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged¹, or of any legal contract², express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'³.

Illustrations.

(a) *A* being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. *A* has committed criminal breach of trust.

(b) *A* is a warehouse-keeper. *Z*, going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. *A* dishonestly sells the goods. *A* has committed criminal breach of trust.

(c) *A*, residing in Calcutta, is agent for *Z* residing at Delhi. There is an express or implied contract between *A* and *Z* that all sums remitted by *Z* to *A* shall be invested by *A* according to *Z*'s direction. *Z* remits a lakh of rupees to *A*, with directions to *A* to invest the same in Company's paper. *A* dishonestly disobeys the directions, and employs the money in his own business. *A* has committed criminal breach of trust.

(d) But if *A*, in the last illustration, not dishonestly but in good faith⁴, believing that it will be more for *Z*'s advantage to hold shares in the Bank of Bengal, disobeys *Z*'s directions and buys shares in the Bank of Bengal for *Z*, instead of buying Company's paper, here, though *Z* should suffer loss, and should be entitled to bring a civil action against *A* on account of that loss, yet *A*, not having acted dishonestly, has not committed criminal breach of trust.

(e) *A*, a revenue officer, is entrusted with public money, and is either directed by law, or bound by a contract⁵, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

(f) *A*, a carrier, is entrusted by *Z* with property to be carried by land or by water. *A* dishonestly misappropriates the property. *A* has committed criminal breach of trust⁶.

the High Court held that he had not committed a criminal breach of trust, 3 Mad. H. C. Rulings, vi. But where the pledgee of property repledges it, this may amount to a criminal breach of trust, 6 Mad. H. C., App. xxviii.

¹ See the Trusts Act, II of 1882, chap. iii. and sec. 95.

² i.e. any agreement enforceable by law.

³ The words of this section are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property and has dishonestly misappropriated it or converted it to his own use, 13 Ben. 311, per Couch C.J.

⁴ Sec. 52.

⁵ *A*, one of *B*'s servants, being sent by his fellow-servants to receive

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both¹.

Punishment for criminal breach of trust.

407. Whoever being entrusted with property as a carrier, wharfinger, or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine².

Criminal breach of trust by carrier, &c.

408. Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner³ entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine⁴.

Criminal breach of trust by clerk or servant.

409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant⁵ or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either

Criminal breach of trust by public servant, banker, merchant or agent.

their pay from *B*, dishonestly misappropriates the money. *A* has committed criminal breach of trust; *Mayne*, P. C. 323, citing *R. v. Barnes*, L. R., 1 C. C. 45. *Z* intrusts thirty tolas of silver to *A* for the purpose of making them into bangles. *A* substitutes copper for two of the tolas which he dishonestly misappropriates. *A* has committed criminal breach of trust, 4 Bom. H. C., Cr. Ca. 16.

A mortgages Sultānpur to *Z* in the English form, and is allowed by *Z* to remain in possession. *A* wilfully makes default in payment of the Government revenue due in respect of Sultānpur. Thereupon the collector sells it, and at the sale *A* buys it *benami*. *A* has committed criminal breach of trust, 5 Suth. Civ. R. 230.

¹ If the evidence in support of the charge leaves it doubtful whether the offence which has been committed is theft or criminal breach of trust, the Court may nevertheless proceed to judgment. See sec. 72.

² As to carriers by water who run their vessels ashore, intending to misappropriate the cargo, see sec. 439. If the breach of trust be proved, but not the entrusting as a carrier, the accused may be convicted under sec. 406 (Cr. P. C. sec. 238).

³ This shows that the legislature wished a liberal construction to be put upon the section in cases where property is, in point of fact, received by the servant as a servant; per *Scotland C.J.*, cited *Mayne*, P. C. 342.

⁴ 10 Suth. Cr. 28.

⁵ See sec. 21, *supra*, and 2 N. W. P. 298. Where a village shroff whose duty it was to assist in collecting the public revenue received grain from ryots and gave receipts as if for money received by virtue of a private arrangement, it was held that he could not be convicted under this section, as he was not authorised to receive the public revenue in kind; and the person who delivered the grain did not thereby discharge himself

description for a term which may extend to ten years, and shall also be liable to fine.

Receiving Stolen Property.

Stolen
property
defined.

410. Property the possession whereof has been transferred by theft¹, or by extortion², or by robbery³, and property which has been criminally misappropriated⁴ or in respect of which the criminal breach of trust has been committed, is designated as 'stolen property,' whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India⁵. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Dis-
honestly
receiving
stolen
property.

411. Whoever dishonestly⁶ receives or retains any stolen property⁷, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both⁸.

Dis-
honestly

412. Whoever dishonestly⁶ receives or retains⁹ any stolen

from liability for the revenue, 4 Mad. H. C. Rulings, xxxiii. So where the public servant improperly delegates the custody of Government property, taking security to save himself from loss, the delegate, though himself a public servant, does not seem punishable under this section, where he dishonestly converted the property to his own use, 8 Suth. Cr. i.

¹ Sec. 378.

² Sec. 383.

³ Sec. 390.

⁴ i. e. dishonestly misappropriated or converted to the offender's own use, sec. 403.

⁵ Sec. 51. The words 'whether . . . India,' inserted in the Code by Act VIII of 1882, were suggested by the case reported in 5 Bom. 338, where the Court held that bills of exchange stolen in Mauritius (in which island this Code is not in force) were not 'stolen property' so as to render the person receiving them at Bombay liable under sec. 411.

⁶ Sec. 24.

⁷ i. e. property which had been, and, at the date of the receipt, continued to be, stolen; Mayne, P. C. 344.

Money obtained on a forged money-order is not 'stolen property,' 24 Suth. Cr. 33, 35. Nor is a bull set at large by a Hindú on the occasion of a funeral ceremony, 8 All. 51; for it is then in no one's possession.

⁸ or with whipping, Act VI of 1864, sec. 2. Where the value of the property does not exceed Rs. 50, offences under sec. 411 may be tried summarily, Cr. P. C. sec. 260. A charge under sec. 411 should state that the articles found in the possession of the accused were the property of A B, the owner thereof, 1 Bom. H. C. 95. As to the evidence sufficient for a conviction under this section, see 2 N. W. P. 187; 11 Cal. 160. For the offence of dishonest receipt there must be guilty knowledge at the time of the receipt. The offence of dishonest retention may be complete without any guilty knowledge at the time of receipt, 4 Mad. H. C. Rulings, xlii.

⁹ A man cannot be said to 'receive or retain' (within the meaning of this section) property of which he has already got possession by committing a criminal breach of trust, 2 N. W. P. 313.

property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly¹ receives from a person whom he knows or has reason to believe to belong, or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine².

receiving property stolen in commission of dacoity.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine³.

Habitually dealing in stolen property.

414. Whoever voluntarily⁴ assists in concealing or disposing of or making away with property which he knows or has reason to believe⁵ to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both⁶.

Assisting in concealment of stolen property.

Of Cheating.

415. Whoever, by deceiving⁷ any person, fraudulently⁸ or dishonestly¹ induces the person so deceived to deliver any property⁹ to any person, or to consent¹⁰ that any person shall

Cheating defined.

¹ Secs. 24, 25.

² or with whipping, Act VI of 1864, sec. 2. A commuted sentence of transportation under this section and sec. 59 cannot exceed ten years, 5 Suth. Cr. 16, 17. The prosecution must prove that the accused knew, or had reason to believe, that dacoity had been committed, or that the persons from whom he acquired the property were dacoits, 7 Suth. Cr. 109.

³ And see Act VI of 1864 (the Whipping Act), sec. 4.

⁴ Sec. 39.

⁵ This is very much stronger than 'suspect,' and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property, 6 Bom. 403.

⁶ The offences specified in this section and sec. 411 cannot be con-

sidered as two distinct offences within the meaning of the Cr. P. C., sec. 35; see 4 Mad. H. C. Rulings, xiv. Where the value of the property does not exceed Rs. 50, offences under sec. 414 may be tried summarily, Cr. P. C., sec. 260.

⁷ Where Z knowingly bought watered milk from A, with a view to prove a case against A and thus stop the practice of selling watered milk, A was held not to be guilty of cheating, 18 Suth. Cr. 61.

⁸ Sec. 25.

⁹ It seems that only moveable property is intended, M. & M. 382. But why? The Madras High Court has held that to obtain land free of tax from a Revenue-officer by falsely representing that it is waste is cheating, 6 Mad. H. C., Appx. xii; and see illustration (i), where 'property' is used as equivalent to 'an estate.'

¹⁰ Sec. 90.

retain any property¹, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.²

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations.

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats³.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats⁴.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the

¹ See note 9, p. 251.

² 9 Bom. H. C. 448. A passenger travelling by railway in a carriage of a class higher than that for which he has paid fare does not 'cheat,' though he is guilty of an offence under the Railway Act IV of 1879, sec. 32, cl. (b).

³ A, by marking a reel of cotton-thread as if it contained 300 yards, when in fact it only contained 250 yards, dishonestly induces Z to buy

and pay for the reel. A cheats. (Mayne, P. C. 388.)

⁴ Hence a false statement as to a future fact may constitute a deception within the meaning of sec. 415. The obvious inconveniences resulting from such a doctrine can only be avoided by cleaving to the rule that mere breach of contract is not even *prima facie* evidence of an original fraudulent intention, Mayne, P. C. 350; 9 Bom. H. C. 448.

time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) *A* intentionally deceives *Z* into a belief that *A* has performed *A*'s part of a contract made with *Z*, which he has not performed, and thereby dishonestly induces *Z* to pay money. *A* cheats.

(i) *A* sells and conveys an estate to *B*. *A* knowing that in consequence of such sale he has no right to the property¹, sells or mortgages the same to *Z* without disclosing the fact of the previous sale and conveyance to *B*, and receives the purchase or mortgage money from *Z*. *A* cheats².

416. A person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another³, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations.

(a) *A* cheats by pretending to be a certain rich banker of the same name. *A* cheats by personation.

(b) *A* cheats by pretending to be *B*, a person who is deceased. *A* cheats by personation⁴.

¹ See note 9, p. 251.

² *A* hires from *B* certain property for use at a wedding, pays a portion of the hire, and gives a written promise to pay the balance and restore the property after the wedding. *A* knows that there is to be no such wedding and intends when he gets the property to apply for its attachment in a civil suit against *C*. *A* cheats (3 N. W. P. 16).

A receives from *B* a Government promissory note, promising to return certain jewels pledged to him, but not intending to do so, and subsequently claims to retain the note for another debt alleged to be due to him by *B*. *A* cheats (3 N. W. P. 17).

A secretly enters an exhibition building without a ticket: his act does not amount to cheating, for he did not by deceiving etc. intentionally induce etc. (6 Bom. H. C., Cr. Ca. 8).

A induces *Z* to deliver money to him and on the following day dishonestly absconds without repaying the money.

This does not necessarily amount to cheating, though *A*'s absconding is evidence to show his previous dishonest intention (5 Suth. Cr. 5).

A intentionally deceives *Z* into the belief that *A* is *B*, or that *A* is in good circumstances, and thus induces *Z* to give *A* his daughter in marriage. *A* cheats, M. & M. 384.

A by deception induces *Z* to make an entry in his shop-books that certain goods have been paid for, when the contrary is the fact, or to give credit in account for a greater amount than has actually been paid, or to sign a receipt for a sum which has not been received. In each of these cases the thing which *Z* is induced to do is likely to cause damage to him. *A* therefore cheats.

³ 7 Suth. Cr. 51.

⁴ *A* buys a low-caste girl in Bengal, and takes her to Oudh, where he palms her off as a Rájputni and marries her to a Rájput, after receiving from him the usual bonus. *A* cheats

Punish-
ment for
cheating.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both ¹.

Cheating
with know-
ledge that
wrongful
loss may be
caused to
one whose
interest
offender
bound to
protect.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss ² to a person whose interest in the transaction to which the cheating relates he was bound either by law, or by a legal contract ³, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punish-
ment for
cheating
by person-
ation.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ⁴.

Cheating
and dis-
honestly
inducing
delivery of
property.

420. Whoever cheats and thereby dishonestly ⁵ induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security ⁶, or anything which is signed or sealed, and which is capable of being converted into a valuable security ⁶, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ⁷.

Fraudulent Deeds and Dispositions of Property.

Removal
or conceal-
ment of

421. Whoever dishonestly ⁸ or fraudulently ⁸ removes, conceals, or delivers to any person, or transfers or causes to be

by personation, 7 *Suth. Cr.* 55. Other cases coming within this section are where *A* cheats, 1, by taking any title or addition to which he has no right; 2, 3, 4, by pretending to be of a country, a calling, or a family of which he is not; 5, by falsely pretending to hold or have held any office, real or imaginary; 6, to be related by blood or marriage to any person, real or imaginary; 7, to be in the employ of any person, real or imaginary, *M. & M.* 385.

¹ Where the cheating concerns a valuable security, see sec. 420.

² Sec. 23.

³ an agreement enforceable by law.

⁴ Fraudulent intent is necessary. Thus where *A*, a witness, falsely deposes in *B*'s name in order to avoid

the necessity for *B*'s appearance, *A* should be charged, not with cheating by personation, but with giving false evidence (sec. 193), 1 *Bom. H. C.* 89. So where *A*, having agreed to sell certain land, set out to register the conveyance, but fell ill on the way and sent on *B*, who had the conveyance registered in *A*'s name by personating him, *B* committed an offence under the Registration Act, but not under the Code, 2 *Ben. A. Cr.* 25 (*S. C.* 11 *Suth. Cr.* 24).

⁵ Sec. 24.

⁶ Sec. 30.

⁷ A charge under this section should state that the property obtained was the property of the person defrauded, 1 *Mad. H. C.* 31.

⁸ Sec. 25.

transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law¹ among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both².

property
to prevent
distribu-
tion among
creditors.

422. Whoever dishonestly³ or fraudulently⁴ prevents any debt or demand due to himself or to any other person from being made available according to law¹ for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both².

Preventing
from being
made avail-
able for cre-
ditor's debt
due to
offender.

423. Whoever dishonestly³ or fraudulently⁴ signs, executes, or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration⁵ for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Executing
transfer-
deed con-
taining
false
statement
of consid-
eration.

424. Whoever dishonestly³ or fraudulently⁴ conceals or removes any property of himself or any other person⁶, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁷.

Dishonest
or fraudu-
lent re-
moval or
conceal-
ment of
property.

Mischief.

425. Whoever, with intent to cause⁸, or knowing that he

Mischief
defined.

¹ See the procedure in insolvency, in the Mufassal, Act XII of 1882, sec. 356; and in the Presidency Towns, 11 & 12 Vic. c. 21, secs. 38-44.

² Compare secs. 206-208.

³ Sec. 24.

⁴ Sec. 25.

⁵ 5 Suth. Civ. R. 61; and see the

Stamp Act, I of 1879, secs. 27, 63.

⁶ This would apply to the case of one partner dishonestly removing the account-books of the firm, 13 Ben. 308, note 2 (S. C. 21 Suth. Cr. 10). But see 8 Suth. Cr. 17, 18.

⁷ 2 Sevestre, 949.

⁸ As to the necessity of proving in-

is likely to cause, wrongful loss¹ or damage to the public² or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility³ or affects it injuriously, commits 'mischief⁴.'

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not⁵.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(a) A voluntarily⁶ burns a valuable security⁷ belonging to Z, intending to cause wrongful loss¹ to Z. A has committed mischief.

(b) A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily⁶ throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief⁸.

(e) A, having insured a ship, voluntarily⁶ causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause

tention in the case of the owner of stray cattle, see 6 Ben. Appx. 3; 7 Bom. 126; 9 Bom. 173; 6 Mad. H. C. Rulings, xxxvii.

¹ Sec. 23, and see 3 Ben. App. Cr. 17.

² Sec. 12.

³ The damage contemplated by sec. 425 need not be of a destructive character. Thus where Z, for the purpose of removing certain goods from one *hat* to another, places them upon a cart, and A, a servant of the owner of the former *hat*, overturns the cart, thereby throwing the goods on the road, A is guilty of mischief, 12 Cal. 55.

⁴ 6 Suth. Cr. 59, col. 2. That the destruction of a document evidencing an agreement void for immorality may be mischief, see 5 Mad. 401. As to probable consequential damage, 4 Mad. H. C. Rulings, xv-xvii.

⁵ If a person deals injuriously with property in the *bond fide* belief that it is his own, he cannot be convicted of mischief; 2 All. 101, and see 3 Ben. App. Cr. 17, 18.

⁶ Sec. 39.

⁷ Sec. 30.

⁸ It appears, then, that a man may commit, not only theft, but mischief in respect of his own property.

damage to *Z*, who has lent money on bottomry on the ship¹. *A* has committed mischief².

(*g*) *A*, having joint property with *Z* in a horse, shoots the horse, intending thereby to cause wrongful loss to *Z*. *A* has committed mischief.

(*h*) *A* causes cattle to enter upon a field belonging to *Z*, intending to cause and knowing that he is likely to cause damage to *Z*'s crop. *A* has committed mischief³.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both⁴.

Punishment for committing mischief.

427. Whoever commits mischief and thereby causes loss⁵ or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both⁶.

Mischief causing damage to amount of Rs. 50.

428. Whoever commits mischief by killing, poisoning, maiming, or rendering useless, any animal or animals⁷ of the

Killing or maiming animal

¹ i.e. on the security of a pledge of the keel or bottom of a ship. See the definition of bottomry-bond in the Stamp Act, I of 1879, sched. I, No. 15.

² So if *A*, knowing that *B*'s house is fully insured against fire, burns it. Here *A* may not cause or intend to cause loss to *B*; but if he knows that he is likely to cause wrongful loss to the insurers, he has committed mischief, *M. & M.* 391.

³ Where *A* merely neglects to fence his field, in consequence of which his cattle stray into *B*'s field, this is not mischief. And where the facts proved were merely that the accused was employed in floating timber through a bridge and some of the logs struck against the arch, no offence has been committed under this section, 5 *Mad. H. C. Rulings*, xl.

⁴ This section provides punishment for the offence of mischief generally. In the various sections which follow, aggravating circumstances are added, and enhanced punishments are provided to suit those circumstances. When one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act, unless there be in the mind of the offender a wholly separate intention, 11 *Bom. H. C.* 14, per *West J.* That separate penal provisions in the same

enactment are not to be understood as cumulative, unless it be so provided, see *Berry v. Henderson*, *L. R.* 5 *Q. B.* 203, per *Lush J.*

As to trying offences under sec. 426 summarily, see *Cr. P. C. sec.* 261.

They may be compounded when the loss or damage caused is only loss or damage to a private person; *ibid. sec.* 345.

⁵ i.e. actual loss, not damage which, in consequence of such loss, may be occasioned to the sufferer, *M. & M.* 393.

⁶ Offences under this section may be tried summarily, *Cr. P. C.* 260, and where the only loss or damage caused is loss or damage to a private person, they may be compounded, *ibid. sec.* 345.

⁷ The animals must be property (as in sec. 430), not wild animals, unless, of course, they have been captured. As to wild animals *Mr. Justice Holmes*, *The Common Law*, p. 217, may be cited: 'The Roman and the common law agree that, in general, fresh pursuit of wild animals does not give the pursuer the rights of possession. Until escape has been made impossible by some means, another may step in and kill or catch and carry off the game if he can. Thus it has been held that an action does not lie against a person for

explosive with intent to destroy house, &c. substance, intending to cause or knowing it to be likely that he will thereby cause, the destruction of any building¹ which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief with intent to destroy or make unsafe a vessel. **437.** Whoever commits mischief to any decked vessel² or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe or knowing it to be likely that he will thereby destroy or render unsafe that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief described in sec. 437 when committed by fire or explosive. **438.** Whoever commits or attempts to commit by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine³.

Intentionally running vessel aground with intent, &c. **439.** Whoever intentionally runs any vessel² aground or ashore, intending to commit theft⁴ of any property contained therein, or to dishonestly⁵ misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief after preparation made for causing death, &c. **440.** Whoever commits mischief, having made preparation for causing to any person death or hurt⁶ or wrongful restraint⁷, or fear of death or of hurt or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

¹ A structure of some permanence and fixedness, not a mere tent or temporary erection, M. & M. 398.

² Sec. 48.

³ A, having insured his ship, voluntarily causes or attempts to cause it to be set on fire and destroyed with the intention of causing

damage to the insurers, A has committed an offence under this section, M. & M. 399.

⁴ Sec. 378.

⁵ Sec. 24.

⁶ Sec. 319.

⁷ Sec. 339.

Criminal Trespass.

441. Whoever enters¹ into or upon property² in the Criminal possession³ of another with intent⁴ to commit an offence⁵, trespass. or to intimidate⁶, insult⁷, or annoy⁸ any person in possession⁹ of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence⁵, is said to commit 'criminal trespass'¹⁰.

442. Whoever commits criminal trespass by entering into or House- remaining in any building, tent or vessel¹¹ used¹² as a human trespass.

¹ Plying a boat for hire at a distance of three miles from a public ferry is not entering upon that ferry, 1 All. 527.

² i. e. corporeal property. Though a right of fishery in a public river is property, the Calcutta High Court (2 Cal. 354) has held that it is not of such a nature that a man who infringes it can be said to commit criminal trespass. The possession is not exclusive. See also 9 Ben. Appx. 19.

³ i. e. actual occupation (M. & M. 401), without reference to the question in whom the title to the property may ultimately be found, 7 Suth. Cr. 28-29.

⁴ Entering on land without such intent, and in the exercise of a *bona fide* claim of sole or joint right, is not criminal trespass, 2 All. 101, 465.

⁵ Sec. 40, cl. 3.

The intent must be to commit an 'offence,' not merely an act which the civil law will prevent or punish. If A merely cultivates Government waste without permission (4 Mad. Jur. 205), or re-enters on land from which he has been ejected by civil process (6 Mad. H. C., App. xix), or enters an exhibition building without a ticket (6 Bom. H. C., Cr. Ca. 6), or passes through a market-fence with intent to evade payment of the market-toll (5 Mad. 382), or breaks open B's door at an illegal hour for the purpose of attaching certain furniture (2 Mad. 30), or follows game upon B's land for the purpose of killing it (4 Cal. 837), or drives a cart across an open green in violation of an order made without authority by municipal commissioners (5 Mad. H. C. Rulings,

xxxviii), A is not guilty of criminal trespass.

⁶ Sec. 503.

⁷ Sec. 504.

⁸ The annoyance intended must be illegal (Mayne, P. C. p. 368), and is such as would generally and reasonably affront an ordinary person, not what would specially and exclusively annoy a particular individual, 2 All. 467.

⁹ i. e. actual possession (2 All. 467, 468; 8 Ben. Appx. 62), such as is contemplated by the Criminal Procedure Code, sec. 145.

¹⁰ The entrance of a member of a Hindú joint family into the family dwelling-house is not criminal trespass; nor is the entry of a stranger into such a house, with and by the licence of one of the members, 6 Ben. Appx. 81.

Mr. Mayne thinks that sec. 441 'must be limited to cases where the entry is in itself part of the unlawful act, and is either expressly or impliedly against the will of the owner of the property; as, for example, where A goes into B's house with intent to steal his money, or to abduct his daughter, or into C's stable with intent to lame his horse.' Sir B. Peacock (Progs. Leg. Council, 1860, col. 1181) said that one of the cases to which it was intended to apply was that of a beggar walking into a house and, if he saw a lady there, refusing to leave the house unless she gave him some money.

¹¹ Sec. 48.

¹² If the building etc. is ordinarily used as a human dwelling, the cir-

dwelling, or any building used as a place for worship or as a place for the custody of property ¹, is said to commit 'house-trespass.'

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

Lurking
house-
trespass.

443. Whoever commits house-trespass, having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit 'lurking house-trespass.'

Lurking
house-
trespass
by night.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit 'lurking house-trespass by night.'

House-
breaking.

445. A person is said to commit 'house-breaking,' who commits house-trespass if he effects his entrance into the house ² or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence ³, or, having committed an offence ³ therein, he quits the house or any part of it in any of such six ways, that is to say:—

Firstly.—If he enters or quits through a passage made by himself, or by any abettor ⁴ of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor ⁴ of the offence, for human entrance; or through any passage to which he has obtained access by scaling ⁵ or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor ⁴ of the house-trespass has opened, in order

cumstance that it was unoccupied at the time of the offence seems immaterial, *R. v. Ammoyee*, Mayne, P. C. 369.

¹ A cattleyard originally walled on four sides, one wall of which, fallen out of repair, had a gap stopped with a thorn, seems to be a 'building used as a place for the custody of property,' 6 N. W. P. 307.

² An entry upon the roof is not enough, *Mad. H. C. Ruling*, cited Mayne, P. C. 371. Although the words 'tent or vessel' are omitted, it would seem from illustration (b) that sec. 445 is intended to apply to illegal entrances into vessels.

³ Sec. 40, cl. 2.

⁴ Secs. 107, 108.

⁵ 2 *Suth. Cr. 65*, col. 2.

to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force¹ or committing an assault² or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor³ of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations.

(a) A commits house-trespass by making a hole through the wall of Z's house and putting his hand through the aperture. This is house-breaking.

(b) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(c) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) A finds the key of Z's house-door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(g) Z is standing in his door-way. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(h) Z, the door-keeper of Y, is standing in Y's door-way. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

446. Whoever commits house-breaking after sunset and before sunrise is said to commit 'house-breaking by night.'

House-breaking by night.

¹ Sec. 350.

² Sec. 351.

³ Secs. 107, 108.

Punish-
ment for
criminal
trespass.

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both ¹.

Punish-
ment for
house-
trespass.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both ².

House-
trespass
in order to
commit
capital
offence.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death ³, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine ⁴.

House-
trespass
in order to
commit
offence
punishable
with trans-
portation
for life.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life ⁵, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

House-
trespass
in order to
commit
offence
punishable
with im-
prison-
ment.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment ⁶, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

House-
trespass
after pre-
paration
made for
causing
hurt.

452. Whoever commits house-trespass, having made preparation for causing hurt ⁷ to any person, or for assaulting ⁸ any person, or for wrongfully restraining ⁹ any person, or for putting any person in fear of hurt or of assault or of wrongful restraint ¹⁰, shall be punished with imprisonment of either

¹ As to trying offences under this section summarily, see Cr. P. C. sec. 261. They may be compounded, *ibid.* sec. 345.

² Offences under this section may be tried summarily (Cr. P. C. 260), and compounded (*ibid.* sec. 345). A sentence for being member of an unlawful assembly under sec. 144 renders unnecessary a separate sentence under this section, 3 *Suth. Cr.* 54, col. 1.

³ *Supra*, p. 24.

⁴ As to the duty of the public to give information of offences under this and next following section, see Cr. P. Code, sec. 44.

⁵ *Supra*, p. 25.

⁶ *Supra*, p. 25.

⁷ Sec. 319.

⁸ Sec. 351.

⁹ Sec. 339.

¹⁰ A, with a forged warrant of arrest, goes into a house and takes

description for a term which may extend to seven years, and shall also be liable to fine.

453. Whoever commits lurking house-trespass or house-breaking¹ shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Punishment for lurking house-trespass, &c.

454. Whoever commits lurking house-trespass or house-breaking in order to the committing of any offence punishable with imprisonment², shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offence intended to be committed is theft³, the term of the imprisonment may be extended to ten years.

Lurking house-trespass, &c., in order to commit offence punishable with imprisonment.

455. Whoever commits lurking house-trespass or house-breaking having made preparation for causing hurt⁴ to any person, or for assaulting⁵ any person, or for wrongfully restraining⁶ any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Lurking house-trespass, &c., after preparation made for causing hurt.

456. Whoever commits lurking house-trespass by night or house-breaking by night⁷, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Punishment for lurking house-trespass, &c., by night.

457. Whoever commits lurking house-trespass by night or house-breaking by night, in order to the committing of any offence punishable with imprisonment², shall be punished with imprisonment of either description for a term which may

Lurking house-trespass &c. by night, in order to commit

thence *B*, one of the inmates, against his will under the authority of the warrant. *A* has put *B* in fear of wrongful restraint, 12 *Suth. Cr.* 33.

¹ And whoever commits either of these offences in order to the committing of any offence punishable with whipping under the Whipping Act, sec. 2, may be punished with whipping in lieu of fine or imprisonment, Act IV of 1864, sec. 2, *supra*, p. 104.

² *Supra*, p. 25.

³ Sec. 378.

⁴ Sec. 319.

⁵ Sec. 351.

⁶ Sec. 339.

⁷ And whoever commits either of these offences in order to the committing of any offence punishable with whipping under the Whipping Act, sec. 2, may be punished with whipping in lieu of imprisonment or fine, Act VI of 1864, sec. 2, *supra*, p. 104.

As to the duty of the public to give information of offences under secs. 456-460, see *Crim. P. C.* sec. 44.

offence
punishable
with im-
prison-
ment.

Lurking
house-
trespass
&c. by
night, after
prepara-
tion made
for causing
hurt.

extend to five years, and shall also be liable to fine; and if the offence intended to be committed is theft¹, the term of the imprisonment may be extended to fourteen years².

458. Whoever commits lurking house-trespass by night or house-breaking by night, having made preparation for causing hurt³ to any person, or for assaulting⁴ any person, or for wrongfully restraining⁵ any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Grievous
hurt
caused
whilst
commit-
ting lurk-
ing house-
trespass
or house-
breaking.

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt⁶ to any person, or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

All persons
jointly
concerned
in house-
breaking
&c. punish-
able for
death
or griev-
ous hurt
caused by
one of
them.

460. If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt⁶ to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine⁷.

Dis-
honestly
breaking

461. Whoever dishonestly⁸, or with intent to commit mischief⁹, breaks open or unfastens any closed receptacle¹⁰ which

¹ Sec. 378.

² *A*, an inmate of *B*'s house, dishonestly breaks open at night a box of *B*'s and carries away the contents. *A* is guilty of the offences defined in secs. 461 and 378, but not of an offence under sec. 457 (6 N. W. P. 301).

The aggravated offence under sec. 457 should not be split up by the committing magistrate into the separate minor offences under secs. 380 and 456, 6 *Suth. Cr.* 39; and see 2 *All.* 644.

³ Sec. 319.

⁴ Sec. 351.

⁵ Sec. 339.

⁶ Sec. 320.

⁷ Every person jointly concerned in the house-trespass or housebreaking is liable, even though death or grievous hurt was neither the common object of the offenders, nor contemplated by them as likely to result, 11 *Ben.* 355 (S. C. 20 *Suth. Cr.* 5).

⁸ Sec. 24.

⁹ Sec. 425.

¹⁰ This may include not only a room, a part of a room, or closet, etc., but a box or closed package, *M. &*

contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

462. Whoever, being entrusted with any closed receptacle¹ which contains or which he believes to contain property, without having authority to open the same, dishonestly², or with intent to commit mischief³, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

M. 408. The Madras High Court seems to have ruled that a large detached circular receptacle for grain, made of straw, with an opening at the top, is a 'closed receptacle' within the

meaning of this section, *Mayne, P. C.* 369.

¹ See note 10, p. 266.

² Sec. 24.

³ Sec. 415.

open
closed re-
ceptacle.

Same of-
fence when
committed
by person
entrusted
with
custody.

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS¹.

Forgery
defined.

463. Whoever makes² any false document³ or part of a document³ with intent to cause damage or injury⁴ to the public⁵ or to any person⁶, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract⁷, or with intent to commit fraud⁸ or that fraud may be committed, commits forgery⁹.

Making
a false
document.

464. A person is said to make a false document³,—

First.—Who dishonestly¹⁰ or fraudulently¹¹ makes¹²,

¹ No Court can take cognizance of any offence described in sec. 463, or punishable under secs. 471, 475, or 476, where such offence has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate, Cr. P. Code, sec. 195. cl. (c).

² It is not necessary that the document should be published, or that it should be made in the name of an existing person, 2 Ben. App. Cr. 12.

³ Sec. 29. Though the writing is not legal evidence of the matter expressed, it will be a 'document' if the parties framing it believed it to be, and intended it to be used as evidence of such matter, 2 Ben. App. Cr. 12 (S. C. 10 Suth. Cr. 71).

⁴ Sec. 44.

⁵ Sec. 12.

⁶ Falsifications or fabrications of official records, made in order to conceal previous acts of fraud or negligence, do not fall within this section, as such acts cannot be in-

tended 'to cause damage or injury,' etc., 4 Bom. 657; 2 N. W. P. 11; 6 N. W. P. 56; 5 All. 223, 553.

⁷ Here 'contract' (like the 'lawful' or 'legal contract' of sec. 490 and its illustrations, and secs. 491 and 492) probably means an agreement (*pactum*) enforceable by law. Compare Act IX of 1872, sec. 2 (A), *infra*.

⁸ See note to sec. 25, *supra*.

⁹ The forgery of a copy, which is no true copy, comes within this section, Marshall, 272, but not the mere making of a draft of a document in preparation for a forgery intended but not completed, 3 Mad. 4: contra 2 Ben. App. Cr. 12. As to the sanction or complaint required by the prosecution where an offence has been committed under sec. 463 by a party to any proceeding in Court in respect of a document given in evidence on such proceeding, see Cr. P. C. sec. 195. As to the procedure in Civil Courts in case of such offence, see Civ. P. C., sec. 643.

¹⁰ Sec. 24.

¹¹ Sec. 25.

¹² Garth C.J., 7 Cal. 355, thought that the 'making' of a document or

signs¹, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made², signed, sealed, or executed by or by the authority of a person by whom or by whose authority he knows that it was not made², signed, sealed, or executed, or at a time at which he knows that it was not made², signed, sealed, or executed³; or

Secondly.—Who, without lawful authority, dishonestly⁴ or fraudulently⁵, by cancellation or otherwise, alters a document in any material part thereof⁶, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.—Who dishonestly⁴ or fraudulently⁵ causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or intoxication⁷ cannot, or that by reason of deception practised upon him he does not, know the contents of the document or the nature of the alteration.

Illustrations.

(a) *A* has a letter of credit upon *B* for rupees 10,000, written by *Z*. *A*, in order to defraud *B*, adds a cipher to the 10,000,

part of a document means signing or otherwise executing it. Why then were 'makes' and 'made' used as well as 'signs,' 'executes,' 'signed,' 'executed'?

¹ *A*, one of several joint decree-holders, collusively arranged with *B*, the judgment-debtor, that a certain sum should be paid to *A* in satisfaction of the decree, and that he would then stop its execution. *A* accordingly signed a *vakalatnama* in the names of his co-decree-holders and delivered it to a *vakil* with instructions to file a petition, stating that the debt had been satisfied and praying that the case might be struck off the file. *A* has committed forgery, 6 *Suth. Cr.* 78, col. 2.

² See note 12, p. 268.

³ The offence may be complete though no use whatever has been made or attempted to be made of the document, *Mad. H. C. Pro.*, cited *Mayne, P. C.* 378.

⁴ Sec. 24.

⁵ Sec. 25.

⁶ If, for example, *A* makes a lease of a house numbered 6 appear to be a lease of a house numbered 8, by changing 6 into 8; or makes a bond for Rs. 500 seem to have been made for Rs. 5000; or alters the date of a bill of exchange after acceptance, thereby accelerating the time of payment, or alters a bill payable at three months into one payable at twelve months, he alters these documents in 'material' parts. As to complete cancellation or obliteration of a document, see sec. 477. Where *A* altered the date of a document merely for the purpose of procuring its registration, when it would otherwise have been too late, he was guilty, not of forgery under this clause, but of fabricating false evidence under sec. 192 (6 *Cal.* 482).

⁷ Whether voluntary or involuntary.

and makes the sum 100,000, intending that it may be believed by *B* that *Z* so wrote the letter. *A* has committed forgery.

(b) *A*, without *Z*'s authority, affixes *Z*'s seal to a document purporting to be a conveyance of an estate from *Z* to *A*, with the intention of selling the estate to *B*, and thereby of obtaining from *B* the purchase-money. *A* has committed forgery.

(c) *A* picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. *A* fraudulently fills up the cheque by inserting the sum of ten thousand rupees. *A* commits forgery.

(d) *A* leaves with *B*, his agent, a cheque on a banker, signed by *A*, without inserting the sum payable, and authorises *B* to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. *B* fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. *B* commits forgery.

(e) *A* draws a bill of exchange on himself in the name of *B* without *B*'s authority, intending to discount it as a genuine bill with a banker, and intending to take up the bill on its maturity. Here, as *A* draws the bill with intent to deceive the banker by leading him to suppose that he had the security of *B*, and thereby to discount the bill, *A* is guilty of forgery.

(f) *Z*'s will contains these words—'I direct that all my remaining property be equally divided between *A*, *B*, and *C*.' *A* dishonestly scratches out *B*'s name, intending that it may be believed that the whole was left to himself and *C*. *A* has committed forgery.

(g) *A* endorses a Government promissory note and makes it payable to *Z* or his order, by writing on the bill the words 'Pay to *Z* or his order,' and signing the endorsement. *B* dishonestly erases the words 'pay to *Z* or his order,' and thereby converts the special endorsement into a blank endorsement. *B* commits forgery.

(h) *A* sells and conveys an estate to *Z*. *A* afterwards, in order to defraud *Z* of his estate, executes a conveyance of the same estate to *B*, dated six months earlier than the date of the conveyance to *Z*, intending it to be believed that he had conveyed the estate to *B* before he conveyed it to *Z*. *A* has committed forgery.

(i) *Z* dictates his will to *A*. *A* intentionally writes down a different legatee from the legatee named by *Z*, and by representing to *Z* that he has prepared the will according to his instructions, induces *Z* to sign the will. *A* has committed forgery.

(j) *A* writes a letter and signs it with *B*'s name without *B*'s authority, certifying that *A* is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from *Z* and other persons. Here, as *A* made a false document in order to induce *Z* to part with property, *A* has committed forgery.

(k) *A* without *B*'s authority writes a letter and signs it in *B*'s name, certifying to *A*'s character, intending thereby to obtain employment under *Z*. *A* has committed forgery, inasmuch as he intended to deceive *Z* by the forged certificate, and thereby to induce *Z* to enter into an expressed or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations.

(a) *A* signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. *A* has committed forgery.

(b) *A* writes the word 'accepted' on a piece of paper and signs it with *Z*'s name, in order that *B* may afterwards write on the paper a bill of exchange drawn by *B* upon *Z*, and negotiate the bill as though it had been accepted by *Z*. *A* is guilty of forgery; and if *B* knowing the fact draws the bill upon the paper pursuant to *A*'s intention, *B* is also guilty of forgery.

(c) *A* picks up a bill of exchange payable to the order of a different person of the same name. *A* endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable: here *A* has committed forgery.

(d) *A* purchases an estate sold under execution of a decree against *B*. *B*, after the seizure of the estate, in collusion with *Z*, executes a lease of the estate to *Z* at a nominal rent and for a long period, and dates the lease six months prior to the seizure with intent to defraud *A*, and to cause it to be believed that the lease was granted before the seizure. *B*, though he executes the lease in his own name, commits forgery by antedating it.

(e) *A*, a trader, in anticipation of insolvency, lodges effects with *B* for *A*'s benefit, and with intent to defraud his creditors and in order to give a colour to the transaction writes a promissory note binding himself to pay to *B* a sum for value received, and antedates the note, intending that it may be believed to have been made before *A* was on the point of insolvency. *A* has committed forgery under the first head of the definition.

Explanation 2.—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. *A* commits forgery.

Punish-
ment of
forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ¹.

Forgery
of Court
record or
public
register.

466. Whoever forges a document purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage, or burial ², or a register kept by a public servant ³ as such, or a certificate or document purporting to be made by a public servant in his official capacity ⁴, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment ⁵, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ¹.

Forgery of
valuable
security
or will.

467. Whoever forges a document which purports to be a valuable security ⁶ or a will ⁷, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security ⁶, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money ⁸, moveable property ⁹, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property ⁹ or valuable security ⁶, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ¹.

Forgery for
purpose of
cheating.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating ¹⁰, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ¹.

¹ And see Act VI of 1864 (the Whipping Act), sec. 4; *supra*, pp. 105, 106.

² See Act VI of 1886.

³ Sec. 21.

⁴ The illegibility of the seal and signature on a forged document purporting to be made etc. will not render a conviction under this section or sec. 471 void, 5 *Suth. Cr.* 96.

⁵ Act XXIV of 1865.

⁶ Sec. 30.

⁷ Sec. 31.

⁸ Fraudulent alteration of a col-

lectorate-chaldn comes within these words, *Suth.*, 1864, *Cr.* 22, col. 2. But the concoction of a document which upon its face appears to be a mere copy, and which even if a genuine copy would not authorise the doing of any act referred to in sec. 467, is not an offence under that section, 5 *Bom. H. C.*, *Cr. Ca.* 56.

⁹ Sec. 22. In sec. 467 it is clear that 'moveable property' includes neither money nor valuable securities.

¹⁰ Sec. 415.

469. Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine¹.

Forgery for purpose of harming reputation.

470. A false document made wholly or in part by forgery is designated 'a forged document.'

'Forged document.'

471. Whoever fraudulently or dishonestly² uses as genuine any document which he knows or has reason to believe to be a forged document³, shall be punished in the same manner as if he had forged such document⁴.

Using forged document as genuine.

472. Whoever makes or counterfeits⁵ any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467, or with such intent has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing counterfeit seal &c. with intent to forge valuable security or will.

473. Whoever makes or counterfeits⁵ any seal, plate or other instrument for making an impression, intending that

Making or possessing a counter-

¹ And see Act VI of 1864 (the Whipping Act). A forges a petition with the intention of using it as evidence. The petition falsely states that a certain fakir was beaten and killed by B's orders. A has committed an offence under this section (2 Ben. App. Cr. 12; S. C. 10 Suth. Cr. 61).

² See secs. 24, 25; 5 Cal. 717; 8 Suth. Cr. 81. Where receipts for rent were fabricated in lieu of genuine receipts which had been lost, it has been held that the tenant using the forged receipts in proceedings to recover his holding is not punishable under this section; and see 7 All.

³ The prosecution, in order to establish that a title has been asserted with a fraudulent or dishonest intent, must show that the accused had no reasonable ground for assert-

ing his title, and that he asserted the title fraudulently or dishonestly in the sense in which those terms are used in the Code, 2 N. W. P. 204. The use of a forged document will be fraudulent or dishonest under sec. 471, even though the document itself was unnecessary for the case of the person using it, and though in fact he has a perfectly good title without it, 9 Cal. 53, 60.

⁴ As to the sanction or complaint necessary to prosecute an offence under sec. 471, where it has been committed by a party to any proceeding in a Court in respect to any document given in evidence in such proceeding, see Cr. P. C. sec. 195, cl. (c). As to the procedure in Civil Courts in case of an offence under sec. 471, see Civ. P. C. sec. 643.

⁵ Sec. 28.

feit seal
&c. with
intent to
forge other
docu-
ments.

the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or with such intent has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Possessing
valuable
security or
will known
to be
forged with
intent to
use it as
genuine.

474. Whoever has in his possession¹ any document, knowing the same to be forged, and intending² that the same shall fraudulently³ or dishonestly⁴ be used as genuine, shall, if the document is one of the description mentioned in section 466, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine⁵.

Counter-
feiting
mark used
for authen-
tication
valuable
security or
will.

475. Whoever counterfeits⁶ upon or in the substance of any material any device or mark used for the purpose of authenticating any document described in section 467, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who with such intent has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine⁷.

¹ A document is in a man's possession when it is in any box or place under his control. And see *supra*, p. 56.

² The guilty intention must be proved, *Suth. 1864, Cr. 12*; but this of course can seldom be done directly. Such intention may be inferred where the forged document is capable of being fraudulently used and is found in the possession of one who is interested in making a fraudulent use of it, *Mayne, P. C. 385*.

³ Sec. 25.

⁴ Sec. 24.

⁵ Convictions under this section and sec. 471 cannot stand together, *6 N. W. P. 39*.

⁶ Sec. 28.

⁷ As to the sanction or complaint requisite to the prosecution of any offence under this section committed by a party to any proceeding in Court in respect of a document given in evidence in such proceeding, see *Cr. P. C. sec. 195*.

476. Whoever counterfeits¹ upon or in the substance of any material any device or mark used for the purpose of authenticating any document other than the documents described in section 467, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who with such intent has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine².

Counter-
feiting
mark used
for authen-
ticating
other
documents.

477. Whoever fraudulently³ or dishonestly⁴, or with intent to cause damage or injury⁵ to the public⁶ or to any person, cancels, destroys, or defaces, or attempts to cancel, destroy, or deface, or secretes or attempts to secrete any document which is or purports to be⁷ a will⁸, or an authority to adopt a son, or any valuable security⁹, or commits mischief¹⁰ in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine¹¹.

Fraudu-
lent can-
cellation
&c. of will.

Trade and Property-marks.

478. A mark used for denoting that goods have been made or manufactured by a particular person or at a particular time or place, or that they are of a particular quality, is called a trade-mark.

Trade-
mark.

479. A mark used for denoting that moveable property belongs to a particular person, is called a property-mark.

Property-
mark.

480. Whoever marks any goods, or any case, package, or other receptacle containing goods, or uses any case, package,

Using
false trade-
mark.

¹ Sec. 28.

² See note 7, p. 274.

³ Sec. 25.

⁴ Sec. 24.

⁵ Sec. 44.

⁶ Sec. 12.

⁷ A document which is unstamped and therefore inadmissible as evidence may therefore be a 'valuable se-

curity,' 7 Mad. H. C. Rulings, xxvi.

⁸ Sec. 31.

⁹ Sec. 30. A potta is a valuable security for the purpose of section 477; 3 Suth. Cr. 38, col. 2.

¹⁰ Sec. 425.

¹¹ As to the procedure in Civil Courts in case of offences under secs. 474-477, see Civ. P. C. sec. 643.

or other receptacle with any mark thereon, with the intention of causing it to be believed that the goods so marked, or any goods contained in any such case, package, or receptacle so marked, were made or manufactured by any person by whom they were not made or manufactured, or that they were made or manufactured at any time or place at which they were not made or manufactured, or that they are of a particular quality of which they are not ¹, is said to use a false trade-mark.

Using
false
property-
mark.

481. Whoever marks any moveable property ² or goods, or any case, package, or other receptacle containing moveable property ² or goods, or uses any case, package, or other receptacle having any mark thereon, with the intention of causing it to be believed that the property or goods so marked, or any property or goods contained in any case, package, or other receptacle so marked belong to a person to whom they do not belong is said to use a false property-mark.

Using false
trade or
property-
mark with
intent to
deceive or
injure.

482. Whoever uses any false trade-mark or any false property-mark with intent to deceive ³ or injure any person ⁴, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Counter-
feiting
trade or
property-
mark used
by another,
with
intent, &c.

483. Whoever, with intent to cause damage or injury ⁵ to the public or to any person, knowingly counterfeits ⁶ any trade or property-mark used by any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counter-
feiting
property-
mark used
by public
servant.

484. Whoever, with intent to cause damage or injury ⁵ to the public or to any person, knowingly counterfeits ⁶ any property-mark used by a public servant ⁷, or any mark used by a public servant ⁷ to denote that any property has been manu-

¹ This section does not include false statements as to quantity, as, e. g., where a reel of cotton-thread is marked as containing 300 yards, when in fact it contains only 250.

² Sec. 22.

³ The deception must amount to a fraud or breach of legal obligation. Otherwise, as Mr. Mayne says (P. C. 388), a host who wished to combine

ostentation with economy by giving his guests gooseberry wine out of bottles with champagne labels might be punished under this section.

⁴ Not necessarily any particular person.

⁵ Sec. 44.

⁶ Sec. 28.

⁷ Sec. 21.

factured by a particular person or at a particular time or place, or that the same is of a particular quality, or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

485. Whoever makes or has in his possession any die, plate, or other instrument for the purpose of making or counterfeiting any public or private property or trade-mark, with intent to use the same for the purpose of counterfeiting¹ such mark, or has in his possession any such property or trade-mark with intent that the same shall be used for the purpose of denoting that any goods or merchandise were made or manufactured by any particular person or firm by whom they were not made, or at a time or place at which they were not made, or that they are of a particular quality of which they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Fraudulent making or possessing die &c. for counterfeiting property or trade-mark.

486. Whoever sells any goods with a counterfeit property or trade-mark, whether public or private, affixed to or impressed upon the same or upon any case, wrapper, or receptacle in which such goods are packed or contained, knowing that such mark is forged or counterfeit, or that the same has been affixed to or impressed upon any goods or merchandise not manufactured or made by the person or at the time or place indicated by such mark, or that they are not of the quality indicated by such mark, with intent to deceive, injure or damage any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Knowingly selling goods marked with counterfeit property or trade-mark.

487. Whoever fraudulently² makes any false mark upon any package or receptacle containing goods, with intent to cause any public servant³ or any other person to believe that such package or receptacle contains goods which it does not

Fraudulently making false mark upon package.

¹ Sec. 28.

² Sec. 25.

³ Sec. 21.

contain, or that it does not contain goods which it does contain, or that the goods contained in such package or receptacle are of a nature or quality different from the real nature or quality thereof, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Using
such false
mark.

488. Whoever fraudulently¹ makes use of any such false mark with the intent last aforesaid, knowing such mark to be false, shall be punished in the manner mentioned in the last preceding section.

Defacing
property-
mark with
intent to
cause in-
jury.

489. Whoever removes, destroys or defaces any property-mark, intending or knowing it to be likely that he may thereby cause injury² to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

¹ Sec. 25.

² Sec. 44.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE¹.

490. Whoever, being bound by a lawful contract² to render his personal service in conveying or conducting any person or any property from one place to another place, or to act as servant to any person during a voyage or journey³, or to guard any person or property during a voyage or journey, voluntarily⁴ omits so to do, except in the case of illness or ill-treatment⁵, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both⁶.

Illustrations.

(a) *A*, a palanquin bearer, being bound by legal contract to carry *Z* from one place to another, runs away in the middle of the stage. *A* has committed the offence defined in this section.

(b) *A*, a cooly, being bound by lawful contract to carry *Z*'s baggage from one place to another, throws the baggage away. *A* has committed the offence defined in this section.

(c) *A*, a proprietor of bullocks, being bound by legal contract to convey goods on his bullocks from one place to another⁷, illegally omits to do so. *A* has committed the offence defined in this section.

(d) *A*, by unlawful means, compels *B*, a cooly, to carry his baggage. *B* in the course of the journey puts down the baggage and runs away. Here, as *B* was not lawfully bound to carry the baggage, he has not committed any offence.

¹ No Court can take cognizance of an offence under this chapter except upon a complaint made by some person aggrieved by such offence, Cr.P.C. sec. 198. Any offence under this chapter may be compounded, *ibid.* sec. 345.

² The 'lawful contract' of the secs. 490, 491, 492, and the 'legal contract' of illustrations a and c to sec. 490, doubtless mean the same thing, viz. an agreement enforceable by law.

³ The words 'during a voyage or journey' apply to 'another place' as well as to 'any person.' The section is therefore inapplicable to the breach of an agreement for personal service in conveying indigo from the field

to the vats, 6 Suth. Cr. 80. This section does not apply to servants hired by the month, Rulings of Mad. H. C., cited Mayne, P. C. 392.

⁴ Sec. 39.

⁵ The 'reasonable cause' of sec. 492 is here omitted.

⁶ A continuing contract of service is not terminated by punishment under this section, Mayne, P. C. 393, citing *Unwin v. Clarke*, L. R. 1 Q. B. 417. Mr. Mayne says that the Calcutta High Court appears to have ruled otherwise, 2 R. J. & P. 24. But I cannot find this case.

⁷ i. e. during a voyage or journey, 6 Suth. Cr. 80.

Explanation.—It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

Illustration.

A contracts with a dāk company to drive his carriage¹ for a month. *B* employs the dāk company to convey him on a journey, and during the month the company supplies *B* with a carriage which is driven by *A*. *A* in the course of the journey voluntarily leaves the carriage. Here, although *A* did not contract with *B*, *A* is guilty of an offence under this section.

Breach of contract to attend on and supply wants of helpless persons.

491. Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease of bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily² omits so to do³, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Breach of contract to serve at distant place to which servant is conveyed at master's expense.

492. Whoever, being bound by lawful contract in writing to work for another person as an artificer, workman or labourer, for a period not more than three years, at any place within British India⁴ to which by virtue of the contract he has been or is to be conveyed at the expense of such other, voluntarily⁵ deserts the service of that other during the continuance of his contract, or without reasonable cause⁶ refuses to perform the service which he has contracted⁶ to perform, such service being reasonable and proper service, shall be punished with imprisonment of either description for a term not exceeding one month, or with fine not exceeding double the amount of such expense, or with both; unless the employer has ill-treated him or neglected to perform the contract on his part.

¹ 'his carriage' no doubt means 'one of its carriages.'

² Sec. 39.

³ even in case of illness, ill-treatment, non-payment of wages, or other reasonable cause (secs. 490, 492.)

⁴ Sec. 51.

⁵ Such, e.g., as the approach of a tiger, a hurricane, or an outbreak of cholera in the district through which the servant has agreed to travel.

⁶ in writing.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE¹.

493. EVERY man who by deceit causes any woman who is not lawfully married to him, to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable so fine.

Cohabitation caused by man deceitfully inducing belief of lawful marriage.

494. Whoever, having a husband or wife living², marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife³, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine⁴.

Re-marriage during lifetime of husband or wife.

¹ No Court can take cognizance of an offence falling under secs. 493-496 except upon a complaint made by some person aggrieved by such offence (Cr. P. C. sec. 198), and no Court can take cognizance of an offence under sec. 497 or sec. 498, except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of her on his behalf at the time when the offence was committed (Cr. P. C. sec. 199). Where *A* is prosecuted for a rape on *Z*'s wife and *Z* appears as a witness against him, this does not amount to such a complaint as will sustain an alternative charge against *A* for committing adultery with the wife, 5 All. 233.

² See 6 Bom. 126, where there had been an invalid divorce of a Hindú married couple, and the wife had married again during her husband's life. Hindú law does not consider a marriage dissolved by apostasy. Where, therefore, a Hindú wife was

converted to Muhammadanism and during the life of her Hindú husband went through the ceremony of *nikāh* with a Muhammadan, she was held to be punishable under this section, 4 Bom. 330. Where a Hindú Christian convert married a woman according to the Christian form, and then relapsed into Hindúism and married a Hindú woman, during his first wife's lifetime, he is not guilty under this section, 3 Mad. H. C. Rulings, vii.

³ This section applies to a Hindú or Muhammadan female, but not to a Hindú or Muhammadan man, since though their law permits a plurality of wives it does not permit a plurality of husbands (the polyandry of the Nilgiri Todas, the Nambudiri Brahmans of Malabar, and certain Himalayan tribes is quite exceptional).

⁴ Where a woman belonging to the Teli caste finding that her husband was a leper, married during his life without his consent but with the

Exception.—This section does not extend to any person whose marriage, with such husband or wife, has been declared void by a Court of competent jurisdiction¹, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

Same offence with concealment of former marriage.

495. Whoever commits the offence defined in the last preceding section, having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine².

Fraudulently going through marriage ceremony.

496. Whoever dishonestly³ or with a fraudulent intention⁴ goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

permission of her caste, the Court refused to recognise the authority of the caste to declare the first marriage void, and held that *bona fide* belief that the consent of the caste made the second marriage valid was no defence to a charge under this section, or to a charge of abetment under sec. 109 combined with sec. 494, 1 Bom. 347.

A custom of the Talapda Kolf caste that a woman may leave the husband to whom she has been first married, and contract a second marriage (*satrá*) with another man in his lifetime and without his consent, is invalid, as being opposed 'to the spirit of the Hindú law,' and the woman contracting such marriage is punishable under sec. 494; see 2 Bom. H. C. 124, and see a similar

decision as to a woman of the Mochi caste, 7 Bom. H. C. App. Civ. 133; 10 *ibid.* 381.

¹ See as to Christians, Act IV of 1869; as to Hindú converts to Christianity, Act XXI of 1866; and as to Parsees, Act XV of 1875. This section does not extend to cases where Hindús or Muhammadans have been validly divorced without the intervention of a Court; Mayne, P. C. 403.

² A *nikáh* marriage comes within the purview of secs. 495, 494; 6 *Suth.* Cr. 60.

³ Sec. 24.

⁴ 'with a fraudulent intention' seems = 'fraudulently' (sec. 25). As to the necessity of proving dishonesty or fraudulent intention, see *Suth.* 1864, Cr. 14.

497. Whoever has sexual intercourse¹ with a person who is Adultery, and whom he knows or has reason to believe² to be the wife of another man³, without the consent⁴ or connivance⁵ of that man, such sexual intercourse not amounting to the offence of rape⁶, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both⁷. In such case the wife shall not be punishable as an abettor.

498. Whoever takes or entices away any woman who is Enticing, and whom he knows or has reason to believe² to be the taking wife⁸ of any other man, from that man⁹, or from any person away, or having the care of her on behalf of that man, with intent detaining with criminal that she may have illicit intercourse with any person, or intent married conceals, or detains¹⁰ with that intent any such woman, shall woman.

¹ This may be inferred from acts of guilty familiarity, or from the fact that the parties sought for and created opportunities. It may be proved directly by the evidence of the wife, who may be called as a witness against the adulterer; Mayne, P. C. 405.

² Sec. 26. 5 Bom. H. C., Cr. Ca. 17.

³ Where a prisoner accused of adultery sets up a *nātrā* contracted with the alleged adulteress, in accordance with his caste-custom, the question for the Court is, whether or not he honestly believed, at the time of contracting the *nātrā*, that the woman was another man's wife, 5 Bom. H. C., Cr. Ca. 17.

⁴ Sec. 90.

⁵ Before the time the act was committed. There must be a corrupt intention by acquiescence to assist in the commission of the offence. (Bittleston J. cited in Mayne, P. C. 406.) Mere negligence, inattention, dulness of apprehension, indifference, will not suffice, *Allen v. Allen*, 30 L. J. Mat. 2.

⁶ Sec. 375.

⁷ The death of the husband does not necessarily put an end to a prosecution for an offence under this section, 4 Mad. H. C. Rulings, lv. That a second prosecution cannot be maintained against the same man for adultery with the same woman, she not having in the meantime returned to her husband's protection, is main-

tained by Mr. Mayne, citing *Gipps v. Gipps*, 33 L. J. Mat. 169. That a Hindū contracting a *nātrā* marriage with a woman whom he knows to be another man's wife, and having sexual intercourse with her, without that other's consent or connivance, is guilty of adultery, see 2 Bom. H. C. 124.

⁸ A Canarese woman cohabiting with a man under the *Alyasantāna* law may terminate the relation at pleasure, and is not a 'wife' within the meaning of this section, 6 Mad. 379.

In a charge under this section, proof that the woman and a man, other than the accused, were living together has been held sufficient to throw upon the accused the burden of proving that they are not man and wife, 8 Ben. Appx. 63. But this seems wrong. Reports arising from mere cohabitation ought not to be sufficient evidence in such cases (see Act I of 1872, sec. 50). As to the proof of marriage, see 4 Suth. Cr. 31; *ibid.* Cr. Let. 10. In 5 Cal. 366 and 5 All. 233 the statements of the husband and wife that they were married were held insufficient. But see 9 Mad. 9.

⁹ The taking away of a woman from a house belonging to her husband, or hired by him for her occupation and at his expense, is a taking away from him, even though he be temporarily absent, 5 Suth. Cr. 50.

¹⁰ The words 'conceals or detains'

be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both¹.

apply to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife, for the purpose of illicit intercourse, is the gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandish-

ments, 4 Mad. H. C. 20, 21.

¹ This section and sec. 497 were intended for the protection of husbands, who alone can institute prosecutions under them, and who can compound offences under them, Cr. P. C. sec. 345. As to sec. 498, it has been ruled that, though the advances and solicitation came wholly from the wife, there may be a 'taking' within the meaning of the section, 2 Mad. H. C. 331.

CHAPTER XXI.

OF DEFAMATION¹.

499. Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes² any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person. Defama-
tion.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

¹ No Court can take cognizance of an offence falling under this chapter, except upon a complaint made by some person aggrieved by such offence, Cr. P. C. sec. 198.

As to forgery for the purpose of harming reputation, see sec. 469, supra.

² The defamatory words must be communicated to some one other than

the person using them, and other than the person to whom they are used, 10 Suth. 184; 6 N. W. P. 38. The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, to a subscriber at Allahabad, is a publication at Allahabad, 3 All. 342, 345; and see 5 Suth. Cr. 44, and the note to sec. 294 A supra.

Illustrations.

(a) A says—'Z is an honest man; he never stole B's watch;' intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the Exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the Exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the Exceptions.

Imputation which public good requires to be made or published.

Public conduct of public servants.

Conduct touching public question.

Publication of reports of proceedings of Courts.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact¹.

Second Exception.—It is not defamation to express in good faith² any opinion whatever respecting the conduct of a public servant³ in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no farther.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public⁴ question, and respecting his character, so far as his character appears in that conduct, and no farther.

Illustration.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such a meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice⁵, or of the result of any such proceedings⁶.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

¹ 3 All. 664. This exception is useless, as it is included in the ninth.

² Sec. 52: 4 Bom. 298.

³ Sec. 21.

⁴ Sec. 12.

⁵ Sec. 20.

⁶ But a defamatory statement is not privileged merely because it is used in a petition preferred in a judicial proceeding, 3 All. 815.

Fifth Exception.—It is not defamation to express in good faith¹ any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice², or respecting the conduct of any person as a party, witness, or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no farther.

Merits of
a case de-
cided in
Court; or
conduct of
persons
concerned.

Illustrations.

(a) A says—‘I think Z’s evidence on that trial is so contradictory that he must be stupid or dishonest.’ A is within this Exception if he says this in good faith; inasmuch as the opinion which he expresses respects Z’s character as it appears in Z’s conduct as a witness, and no farther.

(b) But if A says—‘I do not believe what Z asserted at that trial, because I know him to be a man without veracity;’—A is not within this Exception, inasmuch as the opinion which he expresses of Z’s character is an opinion not founded on Z’s conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith¹ any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no farther.

Merits of
public per-
formance.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations.

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z—‘Z’s book is foolish, Z must be a weak man. Z’s book is indecent, Z must be a man of impure mind.’ A is within this Exception if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z’s character only so far as it appears in Z’s book, and no farther.

(e) But if A says—‘I am not surprised that Z’s book is foolish and indecent, for he is a weak man and a libertine;’ A is not within this Exception, inasmuch as the opinion which he expresses of Z’s character is an opinion not founded on Z’s book.

¹ Sec. 52.

² Sec. 20.

Censure
passed in
good faith
by person
having
lawful au-
thority
over an-
other.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law, or arising out of a lawful contract¹ made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this Exception².

Accusation
preferred
in good
faith to
duly
authorised
person.

Eighth Exception.—It is not defamation to prefer in good faith³ an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation⁴.

Illustration.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this Exception.

Imputa-
tion made
in good
faith for
protection
of maker's
interests.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith⁵ for the protection of the interests of the person making it⁶, or of any other person⁷, or for the public⁸ good⁹.

¹ i. e. an agreement enforceable by law.

² 3 All. 664. So is a priest censuring in good faith a member of his sect. But the publication of the censure must not be more extensive than necessary, 6 Mad. 381, where sentence of excommunication (for attending the marriage of a Hindu widow) was conveyed by a postcard from a guru. And, as the censure must be passed 'in good faith,' a superior officer writing maliciously and without reasonable or probable cause reports on the conduct of his inferior officer is not within the seventh exception: see per Cockburn C.J. in *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 95.

³ Sec. 52.

⁴ A reproduction of the English law (*Harrison v. Bush*, 25 L. J., Q. B. 25), 6 All. 221; see 8 Bom. H. C., Cr. Ca. 168.

⁵ Sec. 52: 3 Suth. Cr. R. 45: 9 Bom. H. C. 459: 3 All. 815.

⁶ 7 Mad. 36.

⁷ 9 Bom. 269: 6 Ben. Appx. 43: 11 Ben. 321 (S. C. 17 Suth. 283).

⁸ Sec. 12.

⁹ A pleader or mukhtyār relying on the statements of his client, and in good faith introducing into a pleading a defamatory averment, will be protected by this exception, 2 N. W. P. 474-5.

Illustrations.

(a) *A*, a shopkeeper, says to *B*, who manages his business—‘Sell nothing to *Z* unless he pays you ready money, for I have no opinion of his honesty.’ *A* is within the Exception, if he has made this imputation on *Z* in good faith for the protection of his own interests.

(b) *A*, a magistrate, in making a report to his superior officer, casts an imputation on the character of *Z*. Here, if the imputation is made in good faith, and for the public good, *A* is within the Exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public¹ good². Caution intended for good of person to whom it is conveyed or for public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both³. Punishment for defamation.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both³. Printing or engraving matter known to be defamatory.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both³. Sale of printed or engraved substance containing defamatory matter.

¹ Sec. 12.

² The illustrations to this section all deal with such communications only as are made to third persons. So also each of the exceptions relates to such communications and not to publications only to the person slandered, 7 All. 205, where it was held that sending to a public officer by post in a closed cover a notice containing imputations on his character was not ‘defamation.’ It is unnecessary to prove that the person defamed actually suffered directly or indirectly from the defamation; it is

enough to show that the accused intended, or knew, or had reason to believe that the imputation made by him would harm the reputation of the complainant, 6 N. W. P. 86, 88.

³ The offences under secs. 500, 501, 502 may be compounded, Cr. P. C. 345, and on a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted, Cr. P. C. sec. 521.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT, AND

ANNOYANCE.

Criminal
intimidation.

503. Whoever threatens another¹ with any injury² to his person, reputation or property, or to the person or reputation of any one in whom that person is interested³, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation^{*} of any deceased person in whom the person threatened is interested³, is within this section⁴.

Illustration.

A, for the purpose of inducing *B* to desist from prosecuting a civil suit, threatens to burn *B*'s house. *A* is guilty of criminal intimidation.

Insult
with intent
to provoke
breach of
peace.

504. Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with

¹ either directly or through a third party.

² Sec. 44: see 8 Bom. H. C., Cr. Ca. 101, where it was held that it was not an offence to threaten another with a suit or charge which might lawfully be instituted or made against him.

³ This is very vague. It would include any person in whom *A* is interested as relative, friend, master,

servant, or even subject or fellow-citizen.

⁴ A threat intended to put a person in fear and thereby to dishonestly induce him to deliver property, may amount to an offence punishable under sec. 385 or 389. A threat of a trivial kind, calculated perhaps to give pain, but not to cause alarm, would fall within the exception in sec. 95; M. & M. 449, 450.

imprisonment of either description for a term which may extend to two years, or with fine, or with both¹.

505. Whoever circulates or publishes any statement, rumour or report which he knows to be false, with intent to cause any officer, soldier or sailor in the Army or Navy of the Queen to mutiny, or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State² or against the public tranquillity³, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Circulating false report, &c.

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if the threat be to cause death or grievous hurt⁴, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both⁵.

Punishment for criminal intimidation.

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

Criminal intimidation by an anonymous communication.

508. Whoever voluntarily⁶ causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object⁶ of

Inducing one to believe that he will by offender's act become object of divine displeasure.

¹ Offences under this section may be tried summarily (Cr. P. C. sec. 260), and may be compounded (Cr. P. C. sec. 345).

² See supra, Chap. VI.

³ See supra, Chap. VIII.

⁴ Sec. 320.

⁵ Sec. 39.

⁶ This means, and should be, 'will, by some act of the offender, become or be rendered an object,' etc. See Mayne, P. C. 427.

Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations.

(a) *A* sits dhurna at *Z*'s door with the intention of causing it to be believed that, by so sitting, he renders *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

(b) *A* threatens *Z* that unless *Z* performs a certain act, *A* will kill one of *A*'s own children, under such circumstances that the killing would be believed to render *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

Word or
gesture
intended to
insult
woman's
modesty.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman¹, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Annoy-
ance by
drunken
person.

510. Whoever, in a state of intoxication², appears in any public place, or in any place which it is a trespass³ in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

¹ If the intrusion is by entering her house or rooms, the offence may be criminal trespass, sec. 441.

² If the intoxication is involuntary

sec. 85 would apply.

³ Not necessarily a criminal trespass (sec. 441).

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

511. Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed¹, and in such attempt² does any act towards the commission of the offence³, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence⁴, or with such fine as is provided for the offence, or with both⁵.

Punish-
ment for
attempting
to commit
offences
punish-
able with
transporta-
tion or
imprison-
ment.

Illustrations.

(a) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty under this section.

¹ This leaves untouched attempts to commit, or to cause to be committed, two classes of offences, (1) offences under special or local laws which are not also offences under the Code, and (2) offences under the following sections of the Code, viz. 137, 154, 155, 156, 278, 283, 290, 294 A.

² 3 Ben. App. Cr. 57: 4 N. W. P. 46.

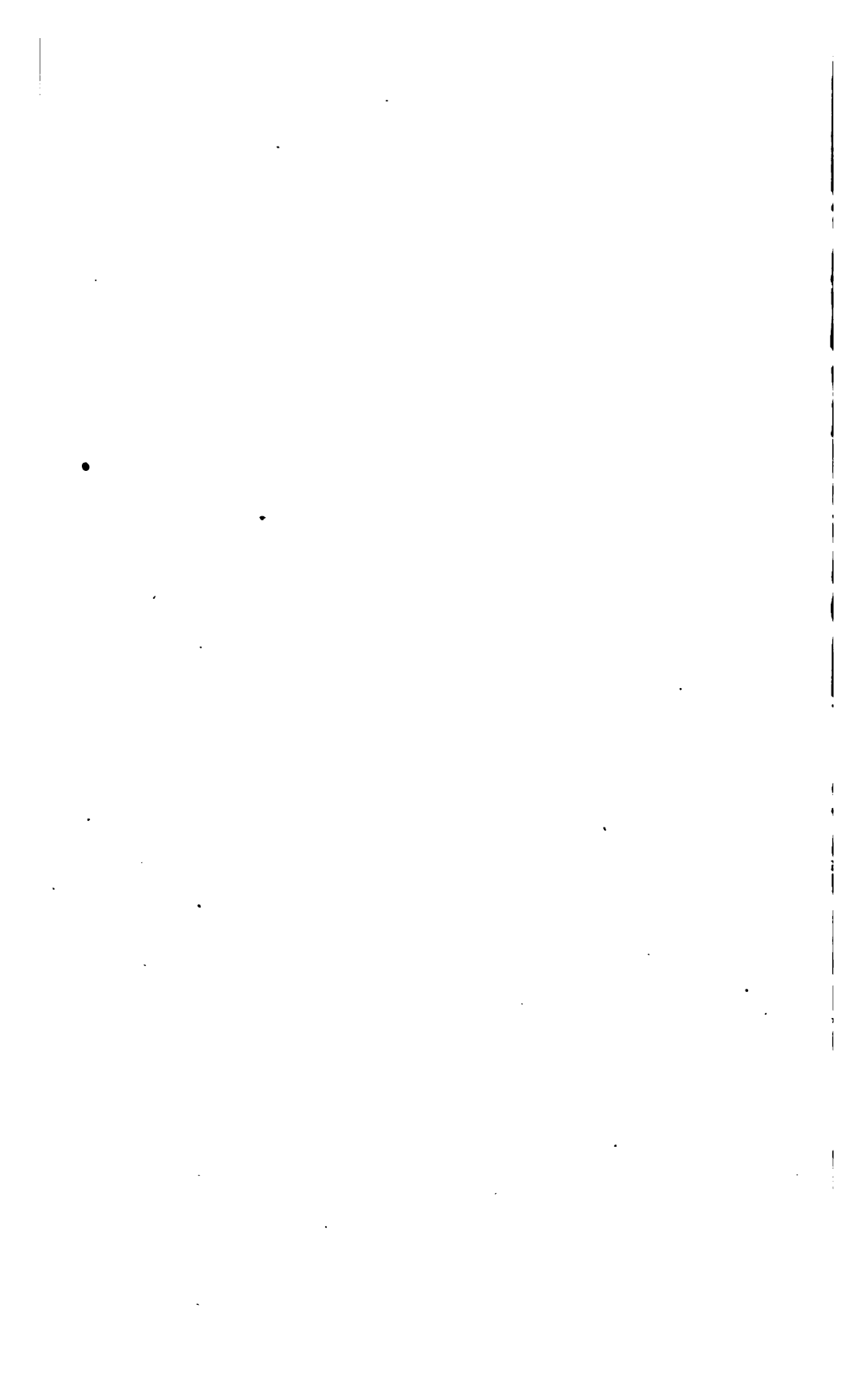
³ There may be an attempt under this section which does not come within sec. 307. Thus, when *A* presented an uncapped gun at *Z* (believing it to be capped) with the intention of murdering *Z*, but was prevented from pulling the trigger, he might be convicted upon a charge of simple attempt to commit murder framed under sec. 511 in connexion with

secs. 299 and 300, 4 Bom. H. C., Cr. Ca. 17.

⁴ Accordingly the maximum term of imprisonment for an attempt at rape (sec. 376) is five years' rigorous imprisonment, 1 Ben. App. Cr. 6. That transportation for life must be reckoned as equivalent to transportation for twenty years, see sec. 57.

As to attempts to commit rape see 5 Bom. 403, where the Court (following *Reg. v. Lloyd*, 7 Car. & Payne, 318) held that a man should not be convicted of such an attempt unless his conduct indicated a determination to gratify his passions at all events and in spite of all resistance.

⁵ See further as to Attempt, *supra*, pp. 67-70.



INTRODUCTION TO THE SUCCESSION ACT.

THE Indian Succession Act (X of 1865) is the first part of the body of substantive law framed for India by the Commissioners appointed by Her Majesty for that purpose. It deals with the most important of all universal successions¹—the passage of the rights and liabilities of a deceased person to his heirs—and it comprises the law of succession to an intestate generally applicable to all classes domiciled in British India, other than the Hindús, Muhammadans, Buddhists and Pársis, each of which portions of the population has laws of its own on the subject. It also regulates testamentary succession to Europeans, East Indians, Jews², Armenians³, Pársis⁴, and Native Christians⁵ domiciled in British India; and large portions of it have been since 1 Sept. 1870 applied to the wills of Hindús, Jainás, Sikhs and Buddhists in the Lower Provinces of Bengal and the towns of Madras and Bombay, or relating to immovable property situate in those Provinces or towns.

In preparing the Succession Act, the law of England has been used as a basis; but the Commissioners deviated from that law in some instances, of which the following are the principal:—

The two chief deviations from English law.

First, the distinction between the devolution of moveable and that of immoveable property is abolished. All rights, as under

¹ It has been thought that two other forms of universal succession are recognised by the law of British India, viz., confiscation to the State (Penal Code, ss. 62, 121, 122), and the succession of a trustee or assignee in insolvency to the rights and liabilities of the insolvent. In the former case, however, the State does not apparently incur the criminal's liabilities, and in the latter the trustee or assignee only pays debts to the extent of the assets.

² As to the law relating to Jews, see *Solomon Hayum Musleah v. Ezra Ezechiel Musleah*, 1 Boulnois, 234; *Musleah v. Musleah*, Fulton, 420.

³ See *Aratoon v. Aratoon*, 7 S. D. A. 528; *Stephen v. Hume*, Fulton, 420; *Phanus Johannes*, Morton, 2nd ed. 16; *Aratoon v. Johannes*, ibid. 19; *Emin v. Emin*, ibid. 242; *Beglar v. Dish-*

koon, 1 Sevestre, 159: the deed-poll executed in favour of the Armenians by the E. I. Company, Morton, 2nd ed. 37; *Gregory v. Cochrane*, 8 Moo. I. A. Ca. 275; *Sarkies v. Prosonomoyee*, 6 Cal. 794.

⁴ *Modae Kaikoorow Hormusjee v. Cooverbhase*, 6 Moo. I. A. Ca. 448. As to the law of husband and wife, see *Mihirwanjee Nuosherwanjee v. Awan Bacc*, 2 Borr. Bom. Rep. 209.

⁵ *Abraham v. Abraham*, 9 Moo. I. A. Ca. 195. The discretionary power of retaining the Native law of succession possessed (according to this decision) by Native converts to Christianity and their Christian descendants appears to be done away with by the Succession Act, except of course where the Act has been made inapplicable to such persons.

the Roman and French¹ law, devolve *ab intestato* agreeably to a uniform and coherent scheme. And we thus get rid of the needless distinction between realty and personalty which, as Austin observed, is one prolific source of the intricacy of the system of the law of England.

Secondly, after the 1st January, 1866, no person acquires by marriage any interest in the property of the person whom he or she marries. This abolishes the husband's right to his wife's personalty, his interest in her realty, as tenant by the courtesy, and the wife's right to her husband's land as tenant by dower². As to her property, it has the effect of a settlement of it to her separate use without restraint on anticipation; and it makes other important changes in the common-law rights, liabilities and disabilities arising out of the relation of husband and wife. Thus, first, as to the effect of marriage on the previous acts and agreements of either party, though it continues to revoke the maker's will³, a spinster's submission to arbitration will not be revoked by her marriage before the award; the marriage of a spinster partner will not operate as a dissolution of a partnership at will; and, when a man marries his creditor, the debt will not thereby be released. Then, as the unity of persons between husband and wife is abolished by sec. 4, when during coverture an estate is conveyed or devised to husband and wife, they will take as joint tenants with equal undivided shares, and each can alienate his or her own moiety in his or her lifetime. At common-law, in such a case, they would take by entireties⁴, and the husband may do what he likes with the rents and profits during coverture. Furthermore, the husband is no longer able, by his indorsement alone, to pass his wife's negotiable instruments⁵, nor can he release or assign her choses in action. Again, as under the Succession Act the husband of an executrix or administratrix is not entitled to administer in his wife's right, he has no power of disposition over the property vested in her as such; and he cannot release debts owing to the estate of the testator or intestate. The only way, then, in which a husband to whom the Succession Act applies becomes, by operation of law, entitled to his wife's estate is as her administrator under sec. 205.

¹ 'La loi ne considère ni la nature ni l'origine des biens pour en régler la succession;' Code Civil, art. 732 (this had been the law of the 17 nivôse, an II).

² The Dower Act, 3 & 4 Wm. IV, c. 105, was extended to India by Act XXIX of 1839.

³ Except when made under a power in the case mentioned in sec. 56, *infra*.

⁴ i.e. each of them is seised of the whole estate, and neither of a part, and the survivor is entitled to the whole.

⁵ As to a wife's liability on her promissory note made during coverture, see 8 Beng. 372.

Following the example set by the framers of the Penal Code, the Commissioners have made copious use of illustrations (mostly taken from the English Equity reports¹), which 'are not merely examples of the law in operation, but the law itself, showing by examples what it is.' These, as most Indian lawyers admit, have obviated many questions of construction and done much to fix the sense of the law. They certainly get rid of the objections which might justly be made to a Code composed exclusively of abstract propositions. As the Commissioners observe:—

'The operation of judicial decisions in making law precise is a natural process, and that process is adopted and improved in the use of illustrations. The laws of England, as they exist, are to be found partly in rules and principles, some of which are contained in statutes and some in books not stamped with any legislative or even judicial authority, and partly in the reports of decisions by judicial tribunals. Law framed in the way in which we have endeavoured to frame it also consists of rules and principles combined with decided cases, but with this difference, that the decisions are not made by Judges in trying causes, but by the legislature itself in enacting the law; and though they are an important part of the law, settling points which without them would have been left to be determined by the Judges, yet they are strictly confined to the function of guiding the Judges in their future decisions, and of explaining in what manner the definitions and rules to which they are annexed are to be interpreted and applied.'

The Act contains forty-one chapters (improperly called Parts), which, for the purpose of this Introduction, may be regarded as falling into seven divisions: I. Preliminary, II. Marriage and Domicile, III. Intestate Succession, IV. Testamentary Succession, V. Executors and Administrators, VI. Legacies, and, VII. Donations *mortis causa*. Division of the subject.

I. PRELIMINARY.

The first, or preliminary, division contains the Short Title (sec. 1); an interpretation clause (sec. 3); and a declaration (sec. 2) that, 'except as provided by this Act' (i.e. by secs. 331, 332), 'or by any other law for the time being in force,' the rules contained in it shall constitute the law of British India applicable to all cases of intestate or testamentary succession. This, it has been

¹ The sources of most of these illustrations are mentioned in *The Indian Succession Act*, 1865, with a commentary, by W. S., Calcutta, 1865, and

in Henderson's *The Law of Intestate and Testamentary Succession in India*, Calcutta, 1882.

Local
extent.

held, operates as a repeal of the previously existing law¹, that is, the Wills Act (XXV of 1838), the Dower Act (XXIX of 1839), and the Inheritance Act (XXX of 1839), so far as regards wills made, marriages contracted, and descents taking place on or after the 1st January, 1866. It also operates as a declaration of the local and personal extent of the Act. It is in force throughout 'British India,' which is defined (sec. 3) as the territories which are or may become vested in Her Majesty or her successors by the statute 21 & 22 Vict. c. 106, other than the Straits Settlement. It is also in force, by virtue of executive orders, in the Haidarâbâd Assigned Districts, the civil and military station of Bangalore, and, probably, the rest of Mysore², the five parganas³ in the Râjputâna Agency under British administration, the cantonment of Sikandarâbâd, Dîsah, and, probably, other British cantonments in Native States, and the non-British parts of certain railways that pass through Native territory⁴. It is, lastly, in force in Zanzibar under the Zanzibar Order in Council of 1884⁵. As to its personal extent, it applies generally to every one domiciled in British India except Hindûs, Muhammadans, Buddhists, Pârsis, and persons exempted by order under sec. 332. It applies, therefore, to domiciled Europeans, to East Indians (or 'Eurasians'), to Jews, Armenians, and (except in Coorg) to Native Christians. Save as regards the law of intestate succession, it applies to Pârsis⁶, and (as above remarked) a large number of its rules as to wills have been extended to Hindûs, Jainas, Sikhs, and Buddhists in the Lower Provinces and the towns of Madras and Bombay.

Personal
extent.

Commence-
ment.

There is no provision as to the commencement of the Act. It therefore came into operation when the Governor-General assented to it (i.e. on the 16th March, 1865), except as to intestacies occurring, wills made, and marriages contracted, before 1st January, 1866.

II. MARRIAGE AND DOMICILE.

For the purpose of simplifying the law of Property, and assimilating the rules as to Succession after death to the rules as to

¹ 12 Ben. 427, per Macpherson J. Before the Wills Act of 1838, 32 Hen. VIII, c. 1, 34 & 35 Hen. VIII, c. 5, and the Statute of Frauds, secs. 5, 6, 12, 19-22, regulated devises, at least in the case of Europeans; see 3 B. & P. 16; 2 J. & W. 334. These enactments were expressly repealed by Act XXV of 1838, except as to wills made before 1st Feb. 1839.

² But it does not apply to Native

Christians in Mysore.

³ Todgarh, Dewair, Saroth, Chang, and Kot-Karana.

⁴ The Great Indian Peninsula, Madras, Nâgpur and Chhatîsagar, Nizam's, Râjputâna-Malwa.

⁵ The Consul-General is to be deemed the District Judge, and the High Court of Bombay hears appeals from his decisions.

⁶ Act XXI of 1865, sec. 8, which

Succession *inter vivos*, it was necessary to abolish the English doctrine that marriage *per se* confers certain rights on a husband to his wife's property, and on a widow to her deceased husband's. Sec. 4 read with sec. 33¹ therefore declares that no person shall, by marriage contracted on or after the 1st January, 1866, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried. This section does not apply, and shall be deemed never to have applied, to any marriage, one or both of the parties to which professed, at the time of the marriage, the Hindú, Muhammadan, Buddhist, Sikh or Jainá religion¹. As sect. 4 is not retrospective, it leaves untouched a woman's right to dower which she possessed before 1st Jan. 1866². It does not apply in respect of the moveable property of a person not having an Indian domicile. But where one of the parties has, and the other has not, an Indian domicile, a special rule is laid down by sec. 44³.

Succession to the immoveable property of a deceased person is, Domicile. in British India as elsewhere, regulated by the *lex loci rei sitæ*. But succession to his moveables is regulated by the law of the country in which he had his domicile at the time of his death.

Part II, therefore, contains rules as to domicile, which agree generally with those recognised in England. The domicile of origin of a posthumous child is, however, to be in the country in which his *father* was domiciled at the time of the death of the latter; and the Act declares that no one shall acquire a domicile in India merely by residing there in Her Majesty's Civil or Military service, or in the discharge of the duties of any public office, or in the exercise of any profession or calling. The old rule was that a person did not change his domicile by going to India in the service of the Crown, but that it was otherwise if he entered the service of the Company. The Act provides a special mode of acquiring an Indian domicile for persons resident in British India for one year immediately preceding the acquisition.

III. INTESSTATE SUCCESSION.

Intestate is chronologically anterior to testamentary succession⁴. The Succession Act accordingly, after defining (as a necessary preliminary to the rules as to Intestacy) consanguinity (secs. 20,

declares that Part III, Part IV (except sec. 25), Part V, and sec. 43 shall not apply to *Páris*s.

¹ Act III of 1874, sec. 2.

² 6 Cal. 794.

³ See *infra*, and 1 Cal. 412.

⁴ Holland, *Jurisprudence*, 4th ed. 136.

21, 22), abolishing the distinction between whole and half blood in case of succession to immoveable property (sec. 23), and giving a table of kindred (sec. 24), defines Intestacy (sec. 25) and regulates the devolution of the intestate's property where he has left—

- (a) a widow and lineal descendants (secs. 27, 30-33);
- (b) a widow and kindred only (secs. 27, 34-41);
- (c) a widow but no kindred (sec. 27);
- (d) no widow, but descendants or other kindred (sec. 28);
- (e) neither widow nor kindred (sec. 28).

In this the English law is followed, except that, when there is a widow but no kindred, the whole property belongs to her instead of one half going to her and the other half going to the Crown.

Sec. 42 declares that anything which a child may have received from the intestate in his lifetime by way of advancement shall not be deducted from the child's share of the property, or, as an English lawyer would say, shall not be brought into hotchpot. Here the Act varies from English law in the case of gifts by a father. 'The English rule,' say the Commissioners, 'though founded upon a desire to equalise as far as possible the benefits derived by children from their father's property, often fails to effect that object, and proves productive of considerable inconveniences. It tends to encourage minute and difficult investigations of matters of family account, and it frequently interferes with the arrangements of a father who has given property to a child by way of advancement, and yet has not seen fit to make any alteration in his testamentary dispositions; and these evils, which are often felt in England, would be still more felt in India.'

The Act then declares the rights of the widower in respect of the property as to which his wife has died intestate. It provides that, in the case of the marriage of a person not having an Indian domicile to a person having such domicile, neither party shall acquire any rights in respect of the other's property not comprised in an antenuptial settlement, which he or she would not acquire thereby if both were domiciled in India at the time of the marriage. Without some such provision, in the case of an East Indian woman marrying a man domiciled in England and thus acquiring his domicile, her unsettled moveables would immediately become his absolute property, while his immoveable property in India would go according to the *lex loci rei sitae*. Before 1866 the general personal estate of a female infant was bound by a settlement made on her marriage, because such estate became by the marriage the husband's absolute property, and the settlement was,

in effect, his settlement and not hers. But under the provisions of sec. 4 this reason is no longer valid. Moreover, according to the law which prevailed down to 1866 a female infant's real estate was not bound by her marriage settlement. Hence the necessity for a provision (which sec. 45 accordingly contains) to enable a minor's property, whether moveable or immoveable, to be settled in contemplation of marriage.

In the case of Pársis their rules as to intestate succession are Pársis, codified by Act XXI of 1865, as to which see 1 Bom. 506 : 2 Bom. 75 : 4 Bom. 567. In the case of the Hindú and Muhammadan Oudh taluqdárs of Oudh special rules as to intestate succession are contained in Act I of 1869, secs. 21-23, as to which see L. R. 4 I. A. 228 : L. R. 5 I. A. 1.

IV. TESTAMENTARY SUCCESSION.

The principle that a man may override the claims of his kindred in blood and select the person on whom his property is to devolve after his death is, as above suggested, of later origin than the principle of intestate succession¹. The Teutonic, Celtic, and Slavonic barbarians who broke up the Roman Empire were strangers to the conception of a Will², and borrowed it from the Romans : the Jews also seem to have borrowed their rudimentary testament (*tsavvá'ah*) from the same source. The Muslim Arabs learned to make wills when they conquered the Roman provinces of Syria³, Mesopotamia, and Egypt. And either from their Muhammadan or from their English conquerors, the Hindús of Bengal seem to have borrowed the practice of testation⁴. The Succession Act therefore takes up the subject of succession from a testator after it has dealt with the earlier form of succession *ab intestato*. The points to which attention should be directed in studying the provisions as to this matter contained in the Act are the following :—

1. The capacity of the testator. As to this, sec. 46 declares Testamentary capacity that every person—including married women, aliens, criminals—

¹ Holland, *Jurisprudence*, pp. 136, 137.

² See Maine, *Ancient Law*, 172. This is certainly true as to Teutons and Slavs. It is probably true of the Celts—though the ancient Irish had a native word for bequest—*aidacht*, *audacht*, *edoct*.

³ See the fifth century *Syrisches-Römisches Rechtsbuch*, by Bruns and Sachau, Leipzig, 1880, §§ 2, 5, 18,

26-28, 33, 35, 45, 46, 54, 63, 94, 95 of the translation.

⁴ Sir H. Maine thinks, *Ancient Law*, p. 197, that the only form of testament not belonging to a Roman or Hellenic society which can reasonably be supposed indigenous is that recognised by the usages of the province of Bengal. If so, there surely would have been a Sanskrit name for a will.

may make a will, provided he or she is of sound mind, knows what he or she is doing, and is not less than eighteen years of age. It is explained that persons who are deaf, dumb or blind are not thereby incapacitated for making a will, and that a lunatic may make a will during a lucid interval. Wills caused by fraud, coercion, or such importunity as deprives the testator of free agency are void, but no effect is given to proof that the testator acted by mistake¹.

Formalities.

2. The formalities necessary for the execution of a will. These are ordinarily (a) signature or marking by the testator, or signature (not marking) by some other person in his presence and by his direction, with intention thereby to give effect to the writing as a will; (b) attestation by two or more witnesses, each of whom must either have seen the signing or marking above required, or received from the testator a 'personal' acknowledgment of the signature or mark. Each of the witnesses must 'sign' (to 'affix his mark' is not enough) in the testator's presence; but it is not necessary that more than one be 'present at the same time.' In other words, the Succession Act only requires the testator's signature or mark to be made or acknowledged in the presence of one witness at a time; and of course it may be made in the presence of one witness and acknowledged in the presence of another. No more

Privileged wills.

formalities are required in the case of a blind testator. Fewer formalities are required where the testator is (a) a soldier employed in an expedition or engaged in actual warfare, or (b) a mariner at sea. The rules on this subject are contained in sections 52 and 53. In the case of a bequest to religious or charitable uses by a testator having a nephew or niece or any nearer relative, the will must be executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons (sec. 105).

Charitable bequests.

Incapacities to take beneficially.

3. Incapacities to take beneficially under a will. These are the unqualified incapacity of an attesting witness, his or her wife or husband, and any person claiming under either of them (sec. 54), and the incapacities mentioned in the chapter on void bequests, the most important of which is the qualified incapacity of charities (sec. 105), and the unqualified incapacity of a person in whom the thing bequeathed is to vest after the death of some person living at the testator's decease and the minority of a child born or conceived before the death of such person (sec. 101).

¹ See *Milner v. Milner*, 1 Ves. 106.

The disability of corporations to take lands by devise seems not Mortmain. to extend to India¹. It is clear that they may be legatees of moveables. Minors and lunatics may take by bequest, and their acceptance will be presumed unless such presumption would work injury to the legatee.

4. The modes in which a will, when once well made, may subsequently become invalid. These are,—

Invalidation of wills.

(a) by marriage of the testator (sec. 56). The reason is that marriage creates such a change in the testator's condition, such new obligations and duties, that they raise an inference that he would not adhere to a will made previous to their existence. This reason does not apply to a will made in exercise of a power to determine the disposition of property of which the testator is not the owner, when the property would not in default of exercising the power pass to his new family. In this case, therefore, the will is not revoked by marriage.

(b) by a subsequent testamentary instrument (sec. 57) incapable of standing with the former will.

(c) by a writing declaring an intention (i. e. a present intention) to revoke the will and executed in the manner prescribed for a will (sec. 57). In the case of a privileged will writing may be dispensed with (sec. 59).

(d) by destroying the will with intent to revoke it (sec. 57).

The wills of Páris are governed by the Succession Act. Those Páris, of the taluqdárs and grantees of Oudh by Act I of 1869, secs. 19, 20. Oudh taluqdárs.

V. EXECUTORS AND ADMINISTRATORS.

Under the Succession Act, the inheritance does not pass immediately through the operation of the will, where there is one, or by the operation of law, where there is an intestacy; and property of every kind devolves through the same channel. The Act, therefore, facilitates the constitution of a general representative of the deceased with unlimited power, provides (secs. 179-188) for the probate of wills and grant of letters of administration—here following closely the Act regulating and the practice of the English Court of Probate—and declares the powers (secs. 267-275), the duties (secs. 276-291), and the liabilities (secs. 327, 328) of executors and administrators. The chief points in which the Act here varies from English law are these. In

Chief variations from English law.

¹ *Mayor of Lyons v. E. I. Company*, 1 Phill. 185, 192; and *Moo. I. A. Ca.*, 175, 296; *Mitford v. Reynolds*, 1 Phill. 185, 192; and *see Atty. Gen. v. Stewart*, 2 Mer. 143.

England an executor on taking probate of his own testator's will becomes, *ipso facto*, executor not only of that will, but also of the will of any testator of whom that other was sole or surviving executor, and so on *ad infinitum* upwards. Not so under the Succession Act. The probate expires with the death of the grantee, and the effect of secs. 2, 196 and 229 is to discard the dangerous doctrine of derivative executorship. In England, again, co-executors, however numerous, are regarded as an individual person, and a purchaser of the assets from a co-executor is therefore not bound to enquire whether the other executors concur. Under the Succession Act, however (sec. 271), if the testator appoints A, B, C and D to be executors, and directs that two of them shall be a quorum, nothing can be done by a single executor. The result is that in India no one is quite safe in dealing with a single executor unless he sees the probate and ascertains either that there are no other executors or that the will contains no such direction. In England, again, a husband is liable for his wife's *devastavit*, because, as he became possessed of the assets in her right, and as she had no power to act alone, his assent to those acts was presumed. It would seem, however, that by the Succession Act (secs. 4 and 275) this liability is abolished. For under sec. 4 he acquires no interest in her property, and, under sec. 275, she has all the powers of an ordinary executor. Therefore she has power to act alone. Hence his assent to her acts is unnecessary and will not be presumed. Therefore on the principle *cessante ratione cessat et ipsa lex* he will not be liable. Lastly, in England an executor may pay any creditor (whether himself or another person) in preference to another creditor of equal degree. Under the Indian Act, after paying deathbed and funeral expenses, charges of probate, and wages, the executor (sec. 282) must pay all such debts as he knows of (including his own) equally and rateably, as far as the assets of the deceased will extend.

Adminis-
trators-
General.

The Act (sec. 330) saves the rights, duties and privileges of the Administrators-General¹. These are three officers—one at Calcutta, one at Madras, and one at Bombay, with an agent at the India Office in London—whose jurisdiction extends to the whole of India (including the Native States) and whose rights and duties are now regulated by Act II of 1874, amended by Act IX

¹ They are also saved by the Hindú Wills Act (XXI of 1870, sec. 5), the Probate and Administration Act (V of 1881, sec. 149), the Trusts Act (II of 1882, sec. 50), and the Companies Act (VI of 1882, sec. 144, cl. g).

of 1881. They are entitled to administer in preference to a creditor, a non-universal legatee and a friend of the deceased (Act II of 1874, sec. 15), and they can administer, in the Presidency towns, to the estates of all persons, of whatever race or religion, and in the Mufassal, to the estates of all persons other than Hindús, Muhammadans, Buddhists, Pársís, and persons exempted from the operation of the Succession Act. Probate may be granted to the Administrator-General when he is named as executor by virtue of his office; and any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, transfer to him all interests vested in the transferor by virtue of such probate or letters. Thereupon the Administrator-General has the rights and liabilities which he would have had if at the date of the transfer the probate or letters had been granted to him by his name of office. No person other than the Administrator-General acting officially can legally receive or retain any commission or agency-charges for anything done as executor or administrator under any probate or letters of administration (Act II of 1874, sec. 56), and the English practice¹ of allowing executors and administrators, who pass their accounts in England, commission on assets collected in India is now, and has long been, at variance with the law of British India.

When the assets do not exceed Rs. 1000 in value, the Administrator-General may grant a certificate entitling the grantee to receive the property therein mentioned belonging to the estate of the deceased. A copy of the certificate with a receipt annexed, when signed by the grantee, is a full discharge for payment or delivery to him of the money or security therein mentioned (Act II of 1874, secs. 36-41). And where debts are payable in respect of the estate of a deceased Hindú or Muhammadan, the District Court within whose jurisdiction he has ordinarily resided at the time of his death, may (under Act XXVII of 1860, secs. 3, 4) grant a certificate, which affords full indemnity to debtors paying their debts to the grantee. In the absence of a proper system of probate and administration, the holder of such a certificate is, in practice, regarded as having a representative title to the whole estate of the deceased. This result is not only opposed to the intention of the legislature, but is attained at an inadequate cost—the court-fee on a certificate being only two per cent. on the

Certificates granted,
1. by Administrator-General;
2. by District Court.

¹ See *Matthews v. Bagshaw*, 14 Beav. 123; *Cockerell v. Barber*, 1 Sim. 23, S. C. 2 Russ. 585.

amount of the debts in respect of which it is granted. So that a title to an estate worth (say) a lakh of rupees may, if the debts due to it amount to (say) Rs. 100, be obtained at the cost of Rs. 2.

Adminis-
tration by
official
liquidator.

Another kind of official administration is provided by the Companies Act VI of 1882, sec. 144, which permits the official liquidator, with the sanction of the Court, to take out, if necessary, in his official name, letters of administration to the estate of any deceased contributory.

Executor
de son tort.

Where a person improperly intermeddles with the estate of the deceased, while there is no rightful executor or administrator in existence, he is called an 'executor of his own wrong,' and is liable to the extent of the assets which have come to his hands, after deducting payments made to the rightful executor or administrator, and payments made in a due course of administration. The rules on this subject are contained in secs. 265 and 266.

We may leave this part of the subject with the remark that the Succession Act contains no provision empowering an heir to refuse to accept, or entitling him to be relieved from liabilities in excess of assets. Such a provision in the case of Hindú heirs in the Presidency of Bombay is made by Bom. Act VII of 1866.

VI. LEGACIES.

Besides treating of the universal succession which takes place when an executor or administrator succeeds to the aggregate of the rights and liabilities of a testator or intestate, the Indian Act deals with two forms of singular succession, one, the Legacy, the other the Donation *mortis causa*.

Legacies.

A legacy or bequest (the two words are used as synonymous) is a deduction from the inheritance for the benefit of some one. Herein it differs from a donation *mortis causa*, which, though it takes effect on the donor's death, does not do so by way of deduction from the inheritance¹. Under the Succession Act, as under the Roman and English law, a distinction is drawn between the 'vesting' of a legacy (secs. 91, 106-108) and its becoming payable (sec. 297). A legacy may be revoked by the testator either expressly² or impliedly. A legacy is revoked impliedly when it is adeemed, that is, when it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the will. This takes place when anything which has been

Ademp-
tion.

¹ Holland, Jurisprudence, 138, 139.

² Sect. 57 clearly contemplates the revocability of a part only of a will.

specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind. The rules as to this matter are contained in secs. 139-153.

A legacy may also lapse and form part of the residue of the *Lapse.* testator's property. This happens when the legatee does not survive¹ the testator, unless it appear by the will that the testator intended that the legacy should go to some other person. The rules on this subject are contained in secs. 92-98.

A legacy is void under the Succession Act only if inconsistent *Void legacies.* with the rules as to the person who may receive it. These rules are contained in secs. 99-105. One of them is the Indian 'rule against perpetuities,' viz. that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he complete the age of eighteen, the thing bequeathed is to belong. The Act also provides² that a direction to accumulate the income arising from any property shall be void, except where the property is immoveable, or where accumulation is directed to be made from the death of the testator. *Accumulation.* In either of these cases the direction will be valid in respect only of the income arising from the property within *one* year next following the testator's death. The Act also provides³ that a bequest to a person not in existence at the testator's death, subject to a prior bequest, must comprise the whole of the remaining interest of the testator in the thing bequeathed; and that where, at the time fixed for the payment of a legacy, the person for whom it was intended has not come into existence, the bequest shall fail⁴. Here, too, provision is made against deathbed bequests to charitable uses by persons having nephews or nieces or any nearer relatives⁵. The special formalities in such cases have been noticed above.

In Part XVI, which relates to conditional bequests, the Act *Conditional bequests.* excludes from India the refined distinctions which the Court of Chancery has, in relation to personal property, borrowed from the Ecclesiastical Courts. It provides in effect that the words of the will shall be adhered to when no condition inconsistent with law

¹ There is a lapse where the testator and the legatee die at the same time. In the absence of evidence, there is no rule as to survivorship—nothing like the Civil, French, or Muhammadan law *de commorientibus*.

² Sect. 104.

³ Sect. 100.

⁴ Sect. 99.

⁵ Sect. 105. As to charitable bequests by Natives, see 1 Bom. H. C. 71.

or morality is sought to be imposed: that all bequests made upon illegal, immoral or impossible conditions shall be void, and that wherever the testator's wishes can be carried into effect, if expressed in one way, they ought to be permitted to take effect, if expressed in any other way; so that whatever he can do by a limitation he is allowed to do by imposing a condition. The Act also provides that whenever a condition subsequent is valid, if accompanied with a gift over, it shall be valid without a gift over and shall not be treated as if it had been inserted merely *in terrorem*.

Part XVII contains directions as to bequests with directions as to the application or enjoyment of the subject-matter.

Bequests to
executors.

Part XVIII relates to bequests to an executor. He is not to take the legacy unless he proves the will or otherwise manifests an intention to act as executor.

Specific legacies are dealt with by Part XIX: demonstrative legacies by Part XX, and the ademption of legacies by Part XXI.

Part XXII contains provisions, some of which are modelled on Locke King's Act (17 & 18 Vic. c. 113), as to the payment of liabilities in respect of the subject of a bequest. In all cases of specific bequests of moveable or immoveable property, subject to any pledge or incumbrance created by the testator, the legatee, unless a contrary intention appears by the will, is to take the bequest subject to such pledge or incumbrance.

Bequests of
things de-
scribed in
general
terms, of
the produce
of a fund,
of annuities,
legacies to
creditors
and por-
tioners.

The next four Parts relate, respectively, to bequests of things described in general terms, bequests of the interest or produce of a fund, bequests of annuities, and legacies to creditors and portioners. Here the English law is departed from, the Act in effect providing that (1) where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, the testator shall not be presumed to have meant the legacy to be a satisfaction of the debt; (2) where a parent, who is under obligation by contract to provide a portion for his child, fails to do so and afterwards bequeaths a legacy to the child, he shall not be presumed to mean the legacy to be a satisfaction or fulfilment of the obligation; and (3) where a father bequeaths a legacy to his child, and afterwards advances a portion for that child, he shall not be presumed to adeem the legacy thereby.

Election.

Part XXVII states the leading rules as to the doctrine of election, as applied to cases where a man by his will purports to dispose of something which he has no right to dispose of. The principle is that a person who accepts a benefit under any transaction must adopt the whole, giving full effect to its provisions and renouncing every right inconsistent with it. This of course

applies also to transfers *inter vivos*, and the Transfer of Property Act (sec. 35) accordingly contains provisions corresponding with those of Part XXVII.

The subject of Legacies may be left with the remark that the Succession Act contains (in secs. 61-91) some excellent rules as to the interpretation of wills. In framing these rules Mr. Hawkins' book on this subject has been much used. The rules giving a legacy absolutely to the first taker, where words of limitation and not of purchase are added, appear to render it impossible in India to create an estate tail by will.

VII. DONATIONS MORTIS CAUSA.

Gifts of moveables in contemplation of death (commonly called Donations *mortis causa*) are dealt with by sec. 178, which should have been placed at the end of the Act. As above remarked, they do not take effect by way of deduction from the inheritance. They need not therefore be proved, and consent of the administrator or executor is unnecessary. But they resemble legacies in two respects: they are ambulatory and revocable during the donor's life, and they are liable to his debts upon deficiency of assets.

The formalities necessary to this form of gift are almost *nil*. All that is required is delivery of the possession of the property to keep as a gift in case the donor die of the illness from which he is suffering at the date of the delivery. Illustration (b) shows that this delivery may be symbolic.

'Cases of this kind demand the strictest scrutiny. So many opportunities and such strong temptations present themselves to unscrupulous persons to pretend these death-bed donations, that there is always danger of having an entirely fabricated case set up. And without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and by a slight change of words to convert their expressions of intended benefit into an actual gift of property, that no case of this description should prevail unless it is supported by evidence of the clearest and most unequivocal character.' So said Lord Chelmsford in a case from the Isle of Man¹. His remarks are at least as applicable to Indians as to Manxmen.

The subject of donations *mortis causa* made by a Hindú has been learnedly discussed by the High Court at Madras².

¹ *Cosnahan v. Grice*, 15 Moore, P. C. 223.

² 6 Mad. H. C. 270; and see West and Bühler, *Digest of the Hindú Law*, 219.

APPLICATION OF THE SUCCESSION ACT TO HINDÚS
AND BUDDHISTS.

It will be remembered that the Succession Act (sec. 331) declares that its provisions shall not apply to intestate or testamentary succession to the property of any Hindú, Muhammadan, or Buddhist. But this total exclusion from the benefits of a useful Code did not long remain in force.

Although the Sanskrit text-books of Hindú law nowhere recognise a posthumous disposition of property, the validity of a Hindú's will had long been admitted by the Courts in the Presidencies of Bengal¹ and Bombay². In Madras also, after some fluctuations of opinion, it was settled in 1863 that a Hindú's testamentary power is co-extensive with his independent right of alienation *inter vivos*³; but this must be understood as excluding a testamentary disposal of property held by others in common with the testator⁴. Liberty of testation is thus thoroughly established throughout peninsular India⁵, and the practice of making wills is beginning to prevail amongst the Burmese Buddhists, although their law of succession is founded on that of the Hindús. The Muhammadan law recognises the testamentary power, which, however, without the consent of the heirs, does not extend to more than one-third of the testator's estate⁶.

In the case of the Hindús and Burmese the power in question has probably been derived from the English law⁷, and its exercise doubtless produces in India the beneficial effects which it has produced in England and elsewhere, by stimulating the circulation of property and quickening the stagnation of society⁸. But the power was engrafted on the Hindú system and is still used by the Muhammadans, without any of those securities for its due exercise, such as the requirement of writing, signature and attestation, which have been found desirable in Europe. Nor

¹ See 2 Moo. I. A. Ca. 54: 6 *ibid.* 309: 10 *ibid.* 279: 12 *ibid.* 1: 6 Suth. Civ. R. 101.

² See 3 Bom. H. C. 6.

³ 1 Mad. H. C. 326.

⁴ West and Bühler, *Digest*, 219, note (c).

⁵ 9 Moo. I. A. Ca. 123, 135; and as to the N. W. Provinces, *ibid.* 96.

⁶ See the *Hedaya*, iv. 468: 5 Moo. I. A. 199: 2 Mad. H. C. Rep. 350. It has been above suggested that Muhammadan wills are ultimately owing to the civilians of the Eastern Empire,

with whom the Arabs came in contact in Egypt, Syria, and Mesopotamia.

⁷ Mr. Mayne, *Hindu Law*, § 337, thinks that the true origin of the testamentary power is to be sought for in that Brahmanical influence, the working of which he traces in the law of partition and alienation. Why then do the Native languages descended from Sanskrit not even possess a word to express the idea of a will? Why is the earliest known will of a Hindú dated 1758?

⁸ See Maine's *Ancient Law*, p. 194.

were Native testators subject to any restraints such as exist in England in the case of devises to religious or charitable uses, of the postponement of the acquisition of the absolute interest in property, and of prospective accumulations of its income.

Thus the High Court of Bombay had decided that a Hindú's will need not be attested¹, and the High Court of Madras had declared, in a learned judgment given by Mr. Justice Holloway², that a Hindú's will need not be in writing; in other words, that a Hindú may make a valid nuncupative will, and this without any formalities similar to those required in such cases by European legal systems. So Hindús' nuncupative wills were held valid by the late Supreme Court at Fort William³; they were frequently recognised by the present High Court of Judicature for Bengal; and in Bombay⁴ the High Court has upheld such a will though made after the Hindú Wills Act came into force. Considering the facilities with which frauds in setting up nuncupative wills are attended (for false swearing is more easy to perpetrate and more difficult to detect than forgery), it may perhaps be doubted whether the benefits above mentioned arising from the introduction among the Natives of the testamentary power are not counterbalanced by the encouragement which its recognition by our Courts affords to perjury⁵. Moreover, the same evidence that sets up a false oral will may practically revoke a true written one. The witness has only to declare that the testator made an oral will subsequent to the date of the written

¹ 1 Bom. H. C. 77 : 7 *ibid.* 224 : 3 Bom. 7.

² 2 Mad. H. C. 37.

³ The possibility of a Hindú making a valid oral will was admitted on the 6th Feb. 1851 by Peel C.J. and Colville J. in *Sreemutty Woomasoodeny Dossar Bohoo Ranee v. Maharajah Jaudubindroketno Bahadoor* (only reported in the *Englishman*, a Calcutta newspaper, of 11th Feb. 1851), though in that case the evidence of the factum of the alleged will was insufficient. In a later case, reported in 3 *Suth. Civ. R.* 138, the High Court at Fort William said that under the Hindú law a nuncupative will is legal.

⁴ 1 Bom. 641. The will did not comprise any immoveable property to which the Act applied.

⁵ An extract from the Statement of Objects and Reasons accompanying a bill framed by Sir A. Buller for the prevention of fraud may here be usefully quoted : 'The Council is aware that, except in the Presidency Towns (and even there as regards Hindús and Muhammadans), real property may be alienated, and all sorts of property be willed away, by word of mouth, that a verbal authority to a wife to adopt a son is sufficient, and that no writing is required to evidence any contract.' The result of this system naturally is that persons are daily sworn to have given or willed away property when they never did so, to have authorized adoptions which they never did authorize, and to have entered into contracts of which in truth they never dreamed.'

will and revoking the latter, or he has only to declare that the testator gave a verbal authority to destroy the will, and his evidence, if believed, upsets the written will, however solemnly executed or carefully preserved¹. Lastly, even in the case of a genuine testamentary disposition by word of mouth, the certainty of writing is replaced by the frailty of memory.

Then, as to the non-existence of restraints on the testamentary power: a Native may now, on his death-bed, when his mind is enfeebled by disease or fear, deprive his nearest relations of self-acquired property which would otherwise have devolved upon them, and bequeath it in accordance with the dictates of his priests or the promptings of his own superstition. A Native testator, in the absence of anything like what is technically called the rule against perpetuities, may lock up his estate for an indefinite time, and thus obstruct the circulation of property, check the improvement of land, and withdraw capital from its natural employment in commerce. A Native testator may legally create an accumulating trust; absorbing the entire income of property not merely (as in the well-known Thellusson case) during the full period for which the vesting of property may, according to English law, be protracted, but (for anything to the contrary enacted by the Legislature or laid down by the Judges) for the full time expressed by the Native formula of limitation, *achand-rārkam*, 'so long as moon and sun endure.' Thus in the case of a bequest to the testator's family-idol, with directions that, after its expenses are paid, the surplus shall belong to certain persons and their descendants in the male line as a joint family and that none of these legatees shall have power to alienate, the Privy Council has held² that such a testamentary disposition is effectual, although the family may obviously remain undivided for ever. There is reason to fear, too, that under colour of such a bequest to religious uses, a Hindu often not only enjoys property but trades with it, without his beneficial interest being subject to the just demands of his creditors. It may be that the creditors would have a right to come against the surplus income of the property after providing thereout for the expenses of the idol. But the ascertainment of what ought to be allowed for such expenses is generally a matter of such difficulty as practically to reduce that right to a nullity.

¹ See *Wharram v. Wharram*, 3 Swab. & T. 301. As to the sufficiency of a verbal authority by a Hindu testator to destroy his will, though the

will is not in fact destroyed, see *L. R. 4 I. A. 228*: (S. C.) 3 Cal. 626.

² 8 Moo. I. A. Ca. 66.

Again, a Native's will, not requiring to be proved¹, need not be deposited for safe custody. The resulting opportunities for forgery and fraudulent alteration are obvious. Nor can a Native executor be compelled to exhibit an inventory or account of his testator's estate except by the tedious, expensive, and hazardous process of a lawsuit. The consequence is, when the estate is too small to bear the costs of the suit, that women, children, and absentees have no adequate check on the executor, and, at any distance of time, it is difficult to fix him with the possession of moveable and sometimes even of immoveable property².

Lastly, the character and ex officio powers of a Native executor seem to be by no means clearly defined. As to the latter, the late Supreme Court at Calcutta held that a Hindú executor may deal absolutely with the property, and that a purchaser from him is not bound to see to the application of his purchase-money³. But the High Court of Bengal has lately held on appeal⁴ that he has no greater power over immoveable property than a manager. Now the powers of a manager, as declared by the Privy Council in a case⁵ to which the High Court refer, are limited and qualified; and when he makes a mortgage, the lender is bound to enquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If this be so in the case of a mortgage or conditional sale, *à fortiori* it must be so in the case of an absolute sale. It is unnecessary to dwell on the difficulties which this doctrine imposes on all persons dealing with Hindú executors.

These considerations were embodied in a circular issued by the Home Department of the Government of India to the several Local Governments, and led to the passing of the following Act, which was carried through the Council by Mr. (now Sir J. F.) Stephen, and received the assent of the Governor-General on the 19th July, 1870:—

ACT No. XXI OF 1870.

An Act to regulate the Wills of Hindús, Jainas, Sikhs and Preamble.

¹ See 1 Ben. O. C. J. 24: 6 Bom. 73. If he sue as executor he must of course set forth his qualification. Civ. Pr. Code, sec. 50.

² See Morton. Dec., ed. Montrieu, p. 262. As to the practice of resorting to the criminal law in disputes as to

the property of deceased Hindús, see per Couch C.J., 8 Ben. Appx. 62.

³ *Aushotos Dey v. Moheschunder Dutt*, Fulton, 380.

⁴ 1 Bourke, Rep., Part VII, p. 48: S. C. 3 Suth., Misc. App. 7, note.

⁵ 6 Moo. I. A. Ca. 393.

Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay.

Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindús, Jainas, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:—

Short Title.

1. This Act may be called 'The Hindú Wills Act, 1870.'

Portions of Act X of 1865 extended to wills of Hindús, Jainas, Sikhs and Buddhists.

2. The following portions of the Indian Succession Act, 1865, namely, sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive), sections 82, 83, 85, 88 to 103 (both inclusive), sections 106 to 177 (both inclusive), and sec. 187, shall, notwithstanding anything contained in sec. 331 of the said Act, apply—

Extent of Act.

(a) To all wills and codicils made by any Hindú, Jaina, Sikh or Buddhist, on or after the first day of September, 1870, within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) To all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situate within those territories or limits:

Provisos.

3. Provided that marriage shall not revoke any such will or codicil:

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*¹, or to deprive any persons of any right of maintenance² of which, but for sec. 2 of this Act, he could not deprive them by will:

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorise any Hindú, Jaina, Sikh or Buddhist to create in property any interest which he could not have created before the first day of September, 1870³.

¹ See 8 Moo. I. A. 66. As to the power of a Hindú widow to bequeath her property, see 2 C.L.R. 422; as to whether this power extends to accumulations in her hands at her death, 5 Cal. 512.

² Mayne, H. L. § 374 *et seq.*: 9 Ben. 377.

³ See 9 C.L.R. 121, per Wilson J. Contra 8 Cal., per Pontifex J. Some words such as 'or to bequeath property to any person to whom he

4. On and from that day, sec. 2 of Bengal Regulation V of Partial 1799 shall be repealed so far as relates to the executors of persons who are not Muhammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

5. Nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras and Bombay, respectively.

6. In this Act and in the said sections and parts of the Indian Succession Act, all words defined in sec. 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively:

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, and 182 of the said Succession Act to wills and codicils made under this Act, the words 'son,' 'sons,' 'child' and 'children' shall be deemed to include an adopted child; and the word 'grandchildren' shall be deemed to include the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression 'daughter-in-law' shall be deemed to include the wife of an adopted son.

Notwithstanding the Hindú Wills Act, there was no means of conferring upon any one a complete and conclusive title as representative of the estate of a deceased Hindú, Muhammadan or Buddhist, or other person exempt from the operation of the Indian Succession Act.

The Hindú Wills Act is, as we have seen, limited in its operation to Lower Bengal and the towns of Madras and Bombay. Even if it were extended to the rest of British India, it would still only apply to cases of testamentary succession among Hindús; and outside the Presidency Towns there would be no clear power to grant letters of administration in the case of Hindús, Muhammadans and Buddhists dying intestate.

The grant of a certificate under Act XXVII of 1860 makes the grantee a representative only for certain very limited purposes¹, and, though in the Bombay Presidency a certificate purporting

could not have bequeathed it before the same day' should have been added to sec. 3.

¹ He cannot, for instance, recover

property which belonged to the deceased, from a person wrongfully in possession, 8 Suth. 1, 2. See the Civil Procedure Code, s. 366.

to confer larger powers might be obtained under Regulation VIII of 1827, the status of the certificate-holder is by no means clear.

In the Presidency Towns probates of the wills and letters of administration to the estates of deceased Natives could and can be granted under the Supreme Court Charters in cases to which the Succession Act and the Hindú Wills Act do not apply; but the representative status conferred by such grants falls far short of that conferred by similar grants in the case of deceased European British subjects. Thus in 1867¹, the late Mr. Justice Norman held that a Hindú executor took nothing from any grant of the Court. 'His title,' said that learned judge, 'is founded solely and simply on the will of the testator, considered as an instrument of gift. Except for the purpose of evidence, the will of a Hindú does not require probate. . . . As against those who get the probate or oppose the grant of it, [the probate] is no doubt binding; as against parties cited it is evidence, but it has no greater effect than the ordinary decree in a Civil Court against persons who have no means of appearing in the suit or right to dispute the grant.' Furthermore, a grant under those Charters of letters of administration to a Hindú's estate does not affect land², so that in the case of a Hindú dying intestate and leaving both moveable and immoveable property in a Presidency Town it was necessary to have two representatives, one for land and houses, the other for goods. It had, moreover, been ruled³ that, if Hindús take out letters of administration at all they must take out general letters. The useful power of making grants limited to certain property or for certain purposes was, therefore, inapplicable in their cases.

From this state of things much trouble and litigation at times resulted, and, except in the Lower Provinces, Assam, the Panjáb, Burma, and the towns of Madras and Bombay, still result. The heirs may be very numerous: their interests may differ in degree: some of them may be minors or otherwise incapacitated: others may be residing at a distance: the titles of some may be disputed: the settlement of claims against the estate may thus be a matter of endless complication: the making of a satisfactory title to any portion of it which it may be necessary to sell may be impossible. Furthermore, a Native's will, not requiring to be proved, need not be deposited for safe custody. Nor can a Native executor be compelled to exhibit an inventory or account except by

¹ *Sharo Bibi v. Baldeo Das*, 1 Ben. Or. Jur. 24.

² 2 Cal. 433.

³ 4 C. L. R. 290.

a lawsuit. The evil consequences of these defects in the law have been already pointed out¹.

The local authorities having been consulted on the subject were, broadly speaking, in favour of providing means of obtaining probate or letters of administration when those interested in the estate of a deceased person desired to do so; but it was thought undesirable to require probate or letters of administration in all cases, as tending to impose on many poor and ignorant people, where there was no difficulty or dispute, an unnecessary amount of trouble and expense.

In 1881, accordingly, the Indian Legislature passed Act V of 1881² (*An Act to provide for the grant of probates of wills and letters of administration to the estates of certain deceased persons*), the preamble and first two sections of which are as follows:—

‘Whereas it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply; it is hereby enacted as follows:—

‘1. This Act may be called “The Probate and Administration Act, 1881.”

‘It applies to the whole of British India; and it shall come into force on the first day of April, 1881.

‘2. Chapters i to xiii, both inclusive, of this Act shall apply in the case of every Hindú, Muhammadan, Buddhist, and person exempted under sec. 332 of the Indian Succession Act, 1865, dying before, on, or after the said first day of April, 1881:

‘Provided that nothing herein contained shall be deemed to render invalid any transfer of property duly made before that day:

‘Provided also that, except in cases to which the Hindú Wills Act, 1870, applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay and the territories for the time being administered by the Chief Commissioner of British Burma, and no High Court in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the Local

¹ See p. 313, *supra*.

² As to Natives and this Act, see 6 Bom. 75, where, in the case of a Hindú executor, Melvill J. said that ‘there is no law at present in force in the Mufassal which obliges a person claiming under a will to obtain pro-

bate or otherwise establish his right, before he can sue in respect to any property which he claims under the will, and 8 Bom. 266, where West J. ruled that a Muhammadan executor cannot now claim to represent the estate till he has taken out probate.

Government has, with the previous sanction of the Governor-General in Council, by a notification in the official Gazette, authorised it to do so¹.

Sec. 3 is an interpretation clause.

Sec. 4 is = sec. 179 of the Succession Act with the following clause added: 'But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person².' The correspondence of the two Acts may be exhibited in the following table:—

SUCCESSION ACT.	PROBATE AND ADMINISTRATION ACT.
sec. 124	sec. 137.
secs. 180, 181, 182	secs. 5, 6, 7.
183	8, omitting the words 'nor to a married woman without the consent of her husband.'
The reasons for making the husband's consent a condition precedent to the grant of probate or letters of administration to his wife do not apply to Hindús and Muhammadans.	
184, 185, 186, 188	9-12.
187	omitted.
The Act is thus a purely permissive measure.	
189	13, omitting the words 'nor to a married woman without the previous consent of her husband.'
190	omitted.

¹ Notifications under this proviso (which was introduced at the desire of the then Secretary of State) have been issued by the Lieut.-Governor of Bengal (*Calcutta Gazette*, 6th April, 1881), the Lieut.-Governor of the Panjáb (*Panjáb Gazette*, 6th Oct. 1881), and the Chief Commissioners of Assam (*Assam Gazette*, 20th Aug. 1881), and of the Andaman and Nicobar Islands (*Gazette of India*, 28th May, 1881). But no other local Government appears to have done so. The result is that Act V of 1881 is fully in force only in the Lower Provinces, the Panjáb, and the Chief Commissionerships of Assam, Burma, and the Andamans; and Mr. Justice West is therefore entitled to say (*Digest of the Hindú Law*, 3rd ed., p. 225) that 'by sec. 4 coupled with secs. 2 and 3 it appears that the

estate may be vested in an executor who at the same time cannot obtain probate.' But this is not, as he suggests, the fault of the Legislature, but of the Local Governments in not issuing notifications under the second proviso of sec. 2. He also says that the statute-law determining whether an executor takes the property of a testator is 'contradictory in principle,' and quotes in support of this opinion the third paragraph of sec. 21 of Act XXI of 1870 and the second paragraph of section 4 of Act V of 1881. But he omits to mention that the former paragraph was expressly repealed by Act V of 1881, s. 154. Where, then, is the contradiction?

² This was suggested by Mr. Mayne, *Hindú Law and Usage*, § 349. See 10 Bom. H. C. 139: 12 *ibid.* 229.

SUCCESSION ACT.

PROBATE AND ADMINISTRATION ACT.

191-199
200-207

14-22.

23. 'When the deceased has died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

When several such persons apply for administration, it shall be in the discretion of the Court to grant it to any one or more of them.

When no such person applies, it may be granted to a creditor of the deceased.

It would have been impossible to apply secs. 200-207, as they are in part based on a law of intestate succession differing from that of the classes for which Act V of 1881 is intended. The rule here laid down for those classes is that the grant shall follow the interest: that when several persons inheriting portions of the estate claim administration, the Judge may grant it to any or all of them as he thinks fit, and that when no such person applies, he may grant it to a creditor.

208-211
212-214

24-27.

28-31, 'agent' being substituted for 'attorney.'

216

32, the words 'has attained his majority' being substituted for 'have completed the age of eighteen years.'

217

33, extended to minors.

218, 219

34, 35, 'agent,' in the latter section, being substituted for 'attorney.'

220-235, 235 A-238

36-55.

239

omitted.

240, 241, 241 A

56, 57, 58.

242

59, except that the proviso runs thus: 'Provided that probates and letters of administration granted by a High Court established by Royal Charter or by the Chief Court of the Panjab, or by the Court of the Recorder of Rangoon; shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.'

242 A, 243-246, 246 A, 247-253.

60-77.

253 A, 253 B, 253 C, 254, 255.

256

78, but the Judge is given a discretionary power to require bonds from persons to whom probates are granted.

So in England the Chancery Division will compel an insolvent executor to give security.

257-262

79-84.

SUCCESSION ACT.

PROBATE AND ADMINISTRATION ACT.

		85, 'Notwithstanding anything herebefore contained, it shall in cases to which the Hindd Wills Act, 1870, applies, be in the discretion of the Court to make an order refusing, for reasons to be recorded in writing, to grant any application for letters of administration made under this Act.'
263, 264	. . . . .	86, 87.
265, 266	. . . . .	omitted.
267	. . . . .	88, substituting for 'to distrain for all rents,' the words 'may exercise the same powers for the recovery of debts.'
268	. . . . .	89, omitting illustration (b).
269	. . . . .	90, 'An executor or administrator has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit : 'Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.' In illustration (b) the words 'with the consent of the Court' are inserted after 'deceased.'
It was thought unsafe to entrust to Native executors and administrators in the Mufassal the full powers conferred by the Succession Act.		
270-280	. . . . .	91-102.
281	. . . . .	103, adding the words 'according to their respective priorities, if any.'
282	. . . . .	104, omitting the words 'by reason that his debt is secured by an instrument under seal, or on any other account.'
283, 284	. . . . .	omitted.
The reason for the omission is this: the rule that in the case of a deceased person not domiciled in British India his moveable property should be applied to the payment of his debts in accordance with the law of the country in which he was domiciled, could not be applied to Orientals domiciled in countries such as Afghanistan and Nepal, where either there was nothing that could be called law applicable to the matter in question, or such laws as exist are merely personal laws. In the case of such persons the matter is subjected to the law of British India without reference to domicile; in other words, the law of the situs of the assets prevails here as it does in the case of distributing assets under a bankruptcy.		
285-304	. . . . .	105-124.

SUCCESSION ACT.	PROBATE AND ADMINISTRATION ACT.
305	omitted.
306	125.
307	126, substituting six per cent. for four per cent.
308-312	127-131.
313	132, substituting six per cent. for four per cent.
Six per cent. is the ordinary court-rate and the lowest usual rate among Natives.	
314, 315, 316, 317, 318, 319, 320	133, 134, 135, 136, 137 ¹ , 138, 139, substituting the words 'as the High Court may, by any general rule to be made from time to time, prescribe' for 'as would have been given by the High Court in an administration suit.'
321	140, omitting the words 'within two years after the death of the testator or one year after the legacy has been paid.'
322-328	141-147.

Of the remaining sections of the Probate Act two may be mentioned: sec. 148, which declares that in chapters viii, ix, x, and xii the provisions as to an executor shall apply also to an administrator with the will annexed (a declaration accidentally omitted in the Succession Act), and sec. 150, which declares that no proceedings to obtain probate of a will, or letters of administration to the estate of, any Hindú, Muhammadan, Buddhist or person exempted under sec. 332 of the Succession Act shall be instituted except under the Probate Act.

The Succession Act was framed by the Law Commissioners in England and carried through the Council by Mr. (now Sir Henry) Maine. It has now been in force for more than twenty years and has worked smoothly, though its arrangement is not very scientific, though some of its provisions might be more clearly and accurately expressed², though its illustrations are lacking in local colour, and though it provides hardly any of the common forms necessary to give effect to its provisions as to probate and administration. The two great changes which it effected—the abolition of the distinction between the devolution of land and that of moveables, and the abolition of the doctrine that by the mere fact of marriage the husband acquires certain interests in his wife's property and the wife acquires a right to dower out of her husband's land—

¹ This section also embodies sec. 124 of the Succession Act.

² See sec. 50 for example. For slips in drafting see secs. 217, 272, 287, 304, and 312. The omission of any

provision that the provisions in Parts XXXV, XXXVI, XXXVII, and XXXIX as to executors shall apply also to administrators with the will annexed is another serious slip.

have greatly simplified titles and produced none of those social calamities which were so confidently prophesied by opponents of the Bill. As to Hindús and Buddhists, the law relating to wills, probate and administration is still throughout the greater part of India in a very unsatisfactory condition. The evils would to some extent be removed if the Local Governments of Madras, Bombay, the North-west Provinces, Oudh, the Central Provinces, Ajmer, and Coorg issued the notifications mentioned in sec. 2 of Act V of 1881. But even then the law would remain bulky and confusing. The proper course is to consolidate Acts X of 1865, XXI of 1870, V of 1881, and VI of 1881, repealing the Certificate Act, XXVII of 1860, and the Bombay Regulation VIII of 1827, stating clearly under each section to what classes of the population the new Act applies, and for the present exempting Natives from the necessity of taking out probate or administration. There should also be a schedule of forms of the affidavits, bonds, citations, consents, inventories, renunciations, and grants needed in working such a law. As soon as this measure is understood by the people, its necessary effect in quieting titles and obviating litigation as to the ownership of property will induce them to avail themselves largely of its provisions. One result of this would be that they would voluntarily tax themselves to the same extent that all persons whose property is dealt with under the Succession Act or Hindú Wills Act are now taxed: that is to say, property covered by the grant and exceeding Rs. 1000 in amount or value would pay a Court-fee of two per cent.; but property not exceeding that sum would be exempt. People would thus voluntarily and usefully pay to the public treasury a part of the money which they now voluntarily and often uselessly spend in litigation; and the problem of levying a tax on successions to wealthy Natives' estates would thus, to some extent, be solved without hardship to the taxpayer or trouble to the Government.

ARRANGEMENT OF SECTIONS.

PART I.

PRELIMINARY.

	SECTION
Short title	I
This Act to constitute law of British India in cases of Intestate or Testamentary Succession	2
Interpretation Clause	3
Interests and powers not acquired nor lost by marriage	4

PART II.

OF DOMICILE.

Law regulating succession to deceased person's immoveable and moveable property, respectively	5
One domicile only affects succession to moveables	6
Domicile of origin of person of legitimate birth	7
Domicile of origin of illegitimate child	8
Continuance of domicile of origin	9
Acquisition of new domicile	10
Special mode of acquiring domicile in British India	11
Ambassadors and Consuls	12
Continuance of new domicile	13
Minor's domicile	14
Domicile acquired by woman on marriage	15
Wife's domicile during marriage	16
Except in cases stated, minor cannot acquire new domicile	17
Lunatic's acquisition of new domicile	18
Succession to moveable property in British India, in absence of proof of domicile elsewhere	19

PART III.

OF CONSANGUINITY.

Kindred or consanguinity	20
Lineal consanguinity	21
Collateral consanguinity	22
Persons held for purpose of succession to be similarly related to deceased	23
Mode of computing degrees of kindred	24

PART IV.

OF INTESTACY.

As to what property deceased is considered to have died intestate	25
Devolution of such property	26

Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred	27
Where intestate has left no widow, and where he has left no kindred	28

PART V.

OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY.

(a) Where he has left lineal Descendants.

Rules of distribution	29
Where intestate has left child or children only	30
Where intestate has left no child, but grandchild or grandchildren	31
Where intestate has left only great-grandchildren or lineal descendants in remoter degree	32
Where intestate leaves lineal descendants not all in same degree, and those through whom more remote descend are dead	33

(b) Where the intestate has left no lineal Descendants.

Where intestate has left no lineal descendants	34
Where intestate's father is living	35
Where intestate's father is dead, but his mother, brothers and sisters are living	36
Where intestate's father is dead, and his mother, a brother or sister, and children of any deceased brother or sister are living	37
Where intestate's father is dead, and his mother and the children of any deceased brother or sister are living	38
Where intestate's father is dead, but his mother is living and there is no brother nor sister nor nephew.	39
Where intestate has left neither lineal descendant nor father nor mother	40
Where intestate has left neither lineal descendant, nor parent, nor brother nor sister	41
Children's advancements not to be brought into hotchpot	42

PART VI.

OF THE EFFECT OF MARRIAGE AND MARRIAGE SETTLEMENTS
ON PROPERTY.

Rights of widower and widow respectively	43
No rights to property not comprised in an antenuptial settlement acquired by marriage between a person domiciled and person not domiciled in British India	44
Settlement of minor's property in contemplation of marriage	45

PART VII.

OF WILLS AND CODICILS.

Persons capable of making Wills	46
Testamentary guardian	47

ARRANGEMENT OF SECTIONS.

325

	SECTION
Will obtained by fraud, coercion or importunity	48
Will may be revoked or altered	49

PART VIII.

OF THE EXECUTION OF UNPRIVILEGED WILLS.

Execution of unprivileged Wills	50
Incorporation of papers by reference	51

PART IX.

OF PRIVILEGED WILLS.

Privileged Will	52
Mode of making, and rules for executing, privileged Wills	53

PART X.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

Effect of gift to attesting witness	54
Witness not disqualified by interest or by being executor	55
Revocation of Will by testator's marriage	56
Power of appointment defined	ib.
Revocation of unprivileged Will or Codicil	57
Effect of obliteration, interlineation, or alteration in unprivileged Will	58
Revocation of privileged Will or Codicil	59
Revival of unprivileged Will	60
Extent of revival of Will or Codicil partly revoked and afterwards wholly revoked	ib.

PART XI.

OF THE CONSTRUCTION OF WILLS.

Wording of Will	61
Enquiries to determine questions as to object or subject of Will	62
Misnomer or misdescription of object	63
When words may be supplied	64
Rejection of erroneous particulars in description of subject	65
When part of description may not be rejected as erroneous	66
Extrinsic evidence admissible in case of latent ambiguity	67
Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency	68
Meaning of any clause to be collected from entire Will	69
When words may be understood in a restricted sense, and when in a sense wider than usual	70
Where a clause open to two constructions	71
No part of Will to be rejected, if capable of reasonable construction	72

	SECTION
Interpretation of words repeated in different parts of Will	73
Testator's intention to be effectuated as far as possible	74
The last of two inconsistent clauses prevails	75
Will or bequest void for uncertainty	76
Words describing subject refer to property answering that description at testator's death	77
Power of appointment executed by general bequest	78
Implied gift to the objects of power in default of appointment	79
Bequest to 'heirs' &c. of particular person without qualifying terms	80
Bequest to 'representatives' &c. of particular person	81
Bequest without words of limitation	82
Bequest in alternative	83
Effect of words describing class added to bequest to person	84
Bequest to class under a general description only	85
Construction of terms	86
Words expressing relationship denote only legitimate relatives, or failing such, relatives reputed legitimate	87
Construction where Will purports to make two bequests to same person	88
Constitution of residuary legatee	89
Property to which residuary legatee entitled	90
Time of vesting of legacy in general terms	91
When legacy lapses	92
No lapse if one of two joint legatees die before testator	93
Effect, in such case, of words showing intention that shares should be distinct	94
When lapsed share goes as undisposed of	95
When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime	96
Bequest to A for benefit of B does not lapse by A's death in testator's lifetime	97
Survivorship in case of bequest to described class	98

PART XII.

OF VOID BEQUESTS.

Bequest to person by particular description, who does not exist at testator's death	99
Bequest to person not existing at testator's death, subject to prior bequest	100
Rule against perpetuity	101
Bequest to a class, of which some may come under rules in Sections 100 and 101	102
Bequest to take effect on failure of bequest void under Sections 100, 101 or 102	103
Effect of direction for accumulation	104
Bequest to religious or charitable uses	105

PART XIII.

OF THE VESTING OF LEGACIES.

Date of vesting of legacy when payment or possession postponed	106
--	-----

Date of vesting when legacy is contingent upon specified uncertain event .	107
Vesting of interest in bequest to such members of class as attain a particular age	108

PART XIV.

OF ONEBOUS BEQUESTS.

Onerous bequest	109
One of two separate and independent bequests to same person may be accepted, and the other refused	110

PART XV.

OF CONTINGENT BEQUESTS.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence	111
Bequest to such of certain persons as shall be surviving at some period not specified	112

PART XVI.

OF CONDITIONAL BEQUESTS.

Bequest upon impossible condition	113
Bequest upon illegal or immoral condition	114
Fulfilment of condition precedent to vesting of legacy	115
Bequest to A and, on failure of prior bequest, to B	116
Second bequest intended to take effect only where first fails in particular manner	117
Bequest over, conditional upon happening or not happening of specified uncertain event	118
Condition must be strictly fulfilled	119
Original bequest not affected by invalidity of second	120
Bequest conditioned that it shall cease to have effect in case specified uncertain event shall happen or not happen	121
Such condition must not be invalid under Section 107	122
Result of legatee rendering impossible or indefinitely postponing an act for which no time is specified and on non-performance of which the subject-matter is to go over	123
Performance of condition, precedent or subsequent, within specified time .	124
Further time allowed in case of fraud	ib.

PART XVII.

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

Direction that funds be employed in particular manner following absolute bequest of same to or for benefit of any person	125
--	-----

	SECTION
Direction that mode of enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee	126
Bequest of fund for certain purposes, some of which cannot be fulfilled	127

PART XVIII.

OF BEQUESTS TO AN EXECUTOR.

Legatee named as executor cannot take unless he shows intention to act as executor	128
---	-----

PART XIX.

OF SPECIFIC LEGACIES.

Specific legacy defined	129
Bequest of sum certain where stocks &c. in which it is invested are described	130
Bequest of stock where testator had at date of Will equal or greater amount of stock of same kind	131
Bequest of money where it is not to be paid until some part of testator's property has been disposed of in certain way	132
When enumerated articles are not to be deemed to be specifically be- queathed	133
Retention in form of specific bequest to several persons in succession	134
Sale and investment of proceeds of property bequeathed to two or more persons in succession	135
Where deficiency of assets to pay legacies, specific legacy not liable to abate with general legacies	136

PART XX.

OF DEMONSTRATIVE LEGACIES.

Demonstrative legacy defined	137
Order of payment when legacy is directed to be paid out of fund subject of specific legacy	138

PART XXI.

OF ADEMPTION OF LEGACIES.

Ademption explained	139
Non-ademption of demonstrative legacy	140
Ademption of specific bequest of right to receive something from third party	141
Ademption <i>pro tanto</i> by testator's receipt of part of entire thing specifi- cally bequeathed	142
Ademption <i>pro tanto</i> by testator's receipt of portion of entire fund of which a portion has been specifically bequeathed	143

SECTION

Order of payment where portion of fund is specifically bequeathed to one legatee, and legacy charged on same fund to another, and testator having received portion of that fund, remainder is insufficient . . .	144
Ademption where stock, specifically bequeathed, does not exist at testator's death . . .	145
Ademption <i>pro tanto</i> where stock, specifically bequeathed, exists in part only at testator's death . . .	146
Non-ademption of specific bequest of goods described as connected with certain place by reason of removal . . .	147
When removal of thing bequeathed does not constitute ademption . . .	148
When thing bequeathed is to be received by testator from a third person; and testator himself, or his representative, receives it . . .	149
Change by operation of law of subject of specific bequest between date of Will and testator's death . . .	150
Change of subject without testator's knowledge . . .	151
Stock specifically bequeathed, lent to third party on condition that it shall be replaced . . .	152
Stock specifically bequeathed, sold but replaced and belonging to testator at his death . . .	153

PART XXII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF A SUBJECT
OF A BEQUEST.

Non-liability of executor to exonerate specific legatees . . .	154
Completion of testator's title to things bequeathed to be at cost of his estate . . .	155
Exoneration of legatee's immoveable property for which land revenue or rent is payable periodically . . .	156
Exoneration of specific legatee's stock in a Joint Stock Company . . .	157

PART XXIII.

OF REQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

Bequest of thing described in general terms . . .	158
---	-----

PART XXIV.

OF REQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

Bequest of interest or produce of fund . . .	159
--	-----

PART XXV.

OF REQUESTS OF ANNUITIES.

Annuity created by Will is payable for life only, unless contrary intention appears by Will . . .	160
---	-----

	SECTION
Period of vesting where Will directs that annuity be provided out of property, or money bequeathed to buy annuity	161
Abatement of annuity	162
Priority of annuitant to residuary legatee	163

PART XXVI.

OF LEGACIES TO CREDITORS AND PORTIONERS.

Creditor <i>primâ facie</i> entitled to legacy as well as debt	164
Child <i>primâ facie</i> entitled to legacy as well as portion	165
No ademption by subsequent provision for legatee	166

PART XXVII.

OF ELECTION.

Circumstances in which election takes place	167
Devolution of interest relinquished by the owner	168
Testator's belief as to ownership immaterial	169
Bequest for man's benefit how regarded for purpose of election	170
Person deriving benefit indirectly not put to his election	171
Person taking under Will in his individual capacity, may in another character elect to take in opposition to it	172
When acceptance of benefit given by Will constitutes election to take under Will	173
Presumption arising from enjoyment by legatee for two years	174
Confirmation of bequest by act of legatee	175
When testator's representatives may call upon legatee to elect	176
Postponement of election in case of disability	177

PART XXVIII.

OF GIFTS IN CONTEMPLATION OF DEATH.

Property transferable by gift made in contemplation of death	178
When gift is said to be made in contemplation of death	<i>ib.</i>
Such gift resumable	<i>ib.</i>
When it fails	<i>ib.</i>

PART XXIX.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

Character and property of executor or administrator as such	179
Administration with copy annexed of authenticated copy of Will proved abroad	180
Probate to be granted to executor appointed by Will	181
Appointment express or implied	182
Persons to whom probate cannot be granted	183
Grant of probate to several executors simultaneously or at different times	184

	SECTION
Separate probate of Codicil discovered after grant of probate . . .	185
Procedure when different executors are appointed by Codicil . . .	ib.
Accrual of representation to surviving executor . . .	186
No right as executor or legatee, unless probate or letters of administration has been granted . . .	187
Probate establishes Will from testator's death . . .	188
Persons to whom letters of administration may not be granted . . .	189
No right to intestate's property can be established, unless administration previously granted . . .	190
From what period letters of administration entitle administrator to intestate's rights . . .	191
Acts of administrator not validated by letters of administration . . .	192
Grant of administration where executor has not renounced . . .	193
Form and effect of renunciation of executorship . . .	194
Procedure where executor renounces or fails to accept within time limited . . .	195
Grant of administration to universal or residuary legatee . . .	196
Right to administration of representative of deceased residuary legatee . . .	197
Grant of administration when no executor, nor residuary legatee, nor representative of such legatee . . .	198
Citation before grant of administration to any legatee other than universal or residuary . . .	199
Order in which connections entitled to administration . . .	200
Administration to be granted to widow unless Court see cause to exclude her . . .	201
Persons associated with widow in administration . . .	202
Grant of administration where no widow, or widow excluded . . .	203
Proviso . . .	ib.
Deceased's kindred of equal degree, equally entitled to administration . . .	204
Right of widower to administration of wife's estate . . .	205
Grant of administration to creditor . . .	206
Where deceased has left property in British India, administration to be granted according to foregoing rules . . .	207

PART XXX.

OF LIMITED GRANTS.

(a) GRANTS LIMITED IN DURATION.

Probate of copy or draft of lost Will . . .	208
Probate of contents of lost or destroyed Will . . .	209
Probate of copy where original exists . . .	210
Administration until the Will be produced . . .	211

(b) GRANTS FOR THE USE AND BENEFIT OF OTHERS HAVING RIGHT.

Administration, with Will annexed, to attorney of absent executor . . .	212
Administration, with Will annexed, to attorney of absent person, who, if present, would be entitled to administer . . .	213

	SECTION
Administration to attorney of absent person entitled to administer in case of intestacy	214
Administration during minority	215
Administration until one of several minor executors or residuary legatees attains majority	216
Administration for use and benefit of lunatic <i>jus habens</i>	217
Administration <i>pendente lite</i>	218

(c) FOR SPECIAL PURPOSES.

Probate limited to purpose specified in Will	219
Administration with Will annexed limited to particular purpose	220
Administration limited to property in which person has beneficial interest	221
Administration limited to suit	222
Administration limited to purpose of becoming party to suit to be brought against administrator	223
Administration limited to collection and preservation of deceased's property	224
Appointment as administrator, of person other than he who under ordinary circumstances would be entitled to administration	225

(d) GRANTS WITH EXCEPTION.

Probate or administration with the Will annexed, subject to exception	226
Administration with exception	227

(e) GRANTS OF THE REST.

Probate or administration of the rest	228
---	-----

(f) GRANTS OF EFFECTS UNADMINISTERED.

Grant of effects unadministered	229
Rules as to grants of effects unadministered	230
Administration when limited grant has expired, and still some part of estate unadministered	231

(g) ALTERATION IN GRANTS.

What errors may be rectified by the Court	232
Procedure where Codicil discovered after grant of administration with Will annexed	233

(h) REVOCATION OF GRANTS.

Revocation or annulment for just cause, of grant of probate or administration	234
Just cause	<i>ib.</i>

PART XXXI.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES
AND LETTERS OF ADMINISTRATION.

Jurisdiction of District Judge in granting and revoking probates and letters of administration	235
--	-----

Power to appoint Delegate of District Judge to deal with non-contentious cases	235A
District Judge's powers as to the granting of probate and administration	236
District Judge may order any person to produce testamentary papers	237
Proceedings of District Judge's Court in relation to probate and administration	238
When and how District Judge is to interfere for protection of property	239
Probate or administration may be granted by District Judge, when testator or intestate at his death had fixed dwelling or property within jurisdiction	240
When application is made to Judge of District in which deceased had no fixed abode	241
Probate and letters of administration may be granted by Delegate	241A
Conclusiveness of probate or letters of administration	242
Transmission of certificate by High Court granting probate, etc. to other Courts	242A
Conclusiveness of application for probate or administration, if properly made and verified	243
Petition for probate	244
In what cases translation of Will to be annexed to petition	245
Verification of translation made by any person other than Court translator	
Petition for letters of administration	246
Additional statements in petition for probate, etc.	246A
Petition for probate or letters of administration to be signed and verified	247
Verification of petition for probate by one of the witnesses to the Will	248
Punishment for making false averment in petition or declaration	249
District Judge may examine petitioner in person and require further evidence, and issue citations to inspect proceedings	250
Publication of citation	ib.
Caveat against grant of probate or administration	251
Form of caveat	252
After entry of caveat, no proceeding to be taken on the petition until after notice to the caveator	253
District Delegate when not to grant probate or administration	253A
Power to transmit statement to District Judge in doubtful cases where no contention	253B
Procedure, where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court	253C
Grant of probate to be under seal of the Court	254
Form of such grant	ib.
Grant of letters of administration to be under seal of Court	255
Form of such grant	ib.
Administration bond	256
Assignment of administration bond	257
Probate not to be granted until after seven days, and letters of administration until after fourteen days, from death	258
Filing of original Wills of which probate or letters of administration with Will annexed have been granted	259

	SECTION
Grantee of probate or letters of administration shall alone have power to sue, etc., until same revoked	260
Procedure in contentious cases	261
Payment to executor or administrator before probate or letters of administration revoked	262
Right of such executor or administrator to recoup himself for payments	ib.
Appeals from orders made by District Judge under Act	263
Concurrent jurisdiction of High Court	264

PART XXXII.

OF EXECUTORS OF THEIR OWN WRONG.

Executor of his own wrong	265
Liability of an executor of his own wrong	266

PART XXXIII.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

In respect of causes of action surviving deceased, and rents due at time of his death	267
Rights of action in favour of or against deceased, survive to and against his executor or administrator	268
Power of executor or administrator to dispose of deceased's property	269
Purchase by executor or administrator of deceased's property	270
Powers of several executors or administrators, exercisable by one	271
Survival of powers on death of one of several executors or administrators	272
Powers of administrator of effects unadministered	273
Powers of administrator during minority	274
Powers of married executrix or administratrix	275

PART XXXIV.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

As to deceased's funeral	276
Inventory and account	277
Inventory may include property in any part of British India	277A
Duty of executor or administrator as to property of, and debts owing to, the deceased	278
Expenses to be paid before all debts	279
Expenses to be paid next after such expenses	280
Wages for certain services to be next paid, and then the other debts	281
Save as aforesaid, all debts to be paid equally and rateably	282
Application of moveable property to payment of debts, where deceased's domicile foreign	283
Creditor paid in part under Section 283 to bring such payment into account before sharing in proceeds of immoveable property	284
Debts to be paid before legacies	285

	SECTION
Executor or administrator not bound to pay legacies without indemnity	286
Abatement of general legacies	287
Executor not to pay one legatee in preference to another	ib.
Non-abatement of specific legacy when assets sufficient to pay debts	288
Right under demonstrative legacy, when assets are sufficient to pay debts and necessary expenses	289
Rateable abatement of specific legacies	290
Legacies treated as general for purpose of abatement	291

PART XXXV.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

Executor's assent necessary to complete legatee's title	292
Effect of executor's assent to specific legacy	293
Assent may be verbal, and either express or implied	ib.
Conditional assent	294
Assent of executor to his own legacy	295
Implied assent	ib.
Assent of executor gives effect to legacy from testator's death	296
Executor not bound to pay or deliver legacies until after one year from testator's death	297

PART XXXVI.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

Commencement of annuity when no time fixed by Will	298
When payment of annuity to be paid quarterly or monthly first falls due	299
Dates of successive payments when first payment of annuity directed to be made within given time, or on day certain	300
Apportionment where annuitant dies between times of payment	ib.

PART XXXVII.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

Investment of sum bequeathed where legacy, not specific, is given for life	301
Investment of amount of general legacy to be paid at future time	302
Intermediate interest	ib.
Procedure when no fund charged with or appropriated to annuity	303
Transfer to residuary legatee of amount of contingent bequest	304
Investment of residue bequeathed to one for life, without direction to invest in specified securities	305
Investment of residue bequeathed to one for life, with such direction	306
Time and manner of conversion and investment	307
Interest payable until investment	ib.
Procedure where minor is entitled to immediate payment, and no direction to pay to any one on his behalf	308

PART XXXVIII.

OF THE PRODUCE AND INTEREST OF LEGACIES.

	SECTION
Legatee of specific legacy entitled to produce thereof from testator's death	309
Residuary legatee entitled to produce of residuary fund from testator's death	310
Interest when no time is fixed for payment of general legacy	311
Interest when time has been fixed	312
Rate of interest	313
No interest payable on arrears of annuity within first year after testator's death	314
Interest payable on sum to be invested to produce annuity	315

PART XXXIX.

OF THE REFUNDING OF LEGACIES.

Refund of legacy paid under Judge's orders	316
No refund if legacy paid voluntarily	317
Refund when legacy has become due on performance of condition within further time allowed under Section 124	318
When each legatee is compellable to refund in proportion	319
Distribution of assets	320
Creditor may follow assets	ib.
Within what period creditor may call upon legatee to refund	321
When legatee who has not received payment or who has been compelled to refund under Section 321 cannot oblige one who has received payment in full to refund	322
When unsatisfied legatee must first proceed against executor, if solvent	323
Limit to refunding of one legatee to another	324
Refunding to be without interest	325
Residue of deceased's property after usual payments to be paid to residuary legatee	326

PART XL.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR
FOR DEVASTATION.

Liability of executor or administrator for devastation	327
For neglect to get in any part of the deceased's property	328

PART XLI.

MISCELLANEOUS.

<i>Repealed</i>	329
<i>Repealed</i>	330
Succession to property of Hindús, Muhammadans, or Buddhists, and certain Wills, intestacies and marriages, not affected by this Act	331
Power of Governor-General in Council to exempt from operation of Act	332

ACT No. X OF 1865.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 16th March 1865.)

An Act to amend and define the Law of Intestate and Testamentary Succession in British India.

WHEREAS it is expedient to amend and define the rules of Preamble.
law applicable to intestate and testamentary succession in
British India; It is enacted as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as 'The Indian Succession Act, Short Title.
1865.'

2. Except as provided by this Act¹ or by any other law for This Act to
the time being in force², the rules herein contained shall be the law
constitute the law of British India applicable to all cases of of British
intestate or testamentary succession³. India in
cases of
Succession.

3. In this Act, unless there be something repugnant in the Interpretation
subject or context— Clause.

Words importing the singular number include the plural: 'Number.'
words importing the plural number include the singular; and 'Gender.'
words importing the male sex include females.

¹ See infra, secs. 331, 332.

² See the Páral Succession Act,
XXI of 1865, sec. 8.

³ This operates as a repeal of the
previously existing law on the subject,
12 Ben. 427, per Macpherson J.

- 'Person.' 'Person' includes any company or association, or body of persons, whether incorporated or not.
- 'Year.' 'Year' and 'month' respectively mean a year and month
'Month.' according to the British calendar.
- 'Immoveable property.' 'Immoveable property' includes land, incorporeal tenements¹ and things attached to the earth, or permanently fastened to anything which is attached to the earth.
- 'Moveable property.' 'Moveable property' means property of every description except immoveable property.
- 'Province.' 'Province' includes any division of British India having a court of the last resort².
- 'British India.' 'British India' means the territories which are or may become vested in Her Majesty or her successors by the Statute 21 & 22 Vic., cap. 106 (*An Act for the better Government of India*) other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.
- 'District Judge.' 'District Judge' means the judge of a principal civil court of original jurisdiction.
- 'Minor.' 'Minor' means any person who shall not have completed
'Minority.' the age of eighteen years, and 'minority' means the status of such person³.
- 'Will.' 'Will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death⁴.
- 'Codicil.' 'Codicil' means an instrument made in relation to a Will,

¹ Such as rents, easements, rights to advantages arising from situation: see *infra*, the Easements Act, V of 1882, sec. 7.

² It does not, therefore, include Assam, 12 Suth. 424.

³ These definitions do not apply in cases where a person enters into a contract on his own behalf, and not in any representative character under this Act, 12 Ben. 358. They were modified by the Majority Act XI of 1875, sec. 2, so far as regards minors of whose persons or property guardians are appointed by Courts of Justice, and minors under the jurisdiction of Courts of Wards. Such minors do not attain majority until they com-

plete their age of twenty-one years. In computing any person's age the day on which he was born is to be included as a whole day (IX of 1875, sec. 4).

⁴ Taken from the Roman law, Dig. lib. 28, tit. 1, l. 1. If part of a document is clearly testamentary, the remainder, if capable of that construction, may be presumed to have been intended to be testamentary and the document may be proved as a will, 4 Calc. L. R. 401, cited by Henderson, *Law of Intestate and Testamentary Succession in India*, p. 4. That a document may be testamentary only on the happening of a particular event, see 2 Ind. Jur. N. S. 6.

and explaining, altering, or adding to its dispositions. It is considered as forming an additional part of the Will¹.

'Probate' means the copy of a Will certified under the 'Probate' seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator².

'Executor' means a person to whom the execution of the 'Executor' last Will of a deceased person is, by the testator's appointment, confided³.

'Administrator' means a person appointed by competent 'Administrator' authority⁴ to administer the estate of a deceased person when there is no executor.

And in every part of British India to which this Act shall extend, 'Local Government' shall mean the person authorised by law to administer Executive Government in such part; and 'High Court' shall mean the highest Civil Court of Appeal therein, and for the purposes of sections 242, 242 A, and 227 A shall include the Court of the Recorder of Rangoon⁵.

4. No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried⁶.

Interests and powers not acquired nor lost by marriage.

¹ This is now the meaning given by English law to 'codicil.' As to the execution and revocation of codicils, see *infra*, secs. 50, 57.

² See sec. 256, *infra*.

³ expressly or by necessary implication, sec. 182, *infra*.

⁴ The District Judge (sec. 235), a District Delegate (sec. 235 A), the High Court (sec. 264 and proviso to sec. 242).

⁵ Act XIII of 1875, sec. 1. All words defined by sec. 3 of the Succession Act have the same meaning under the Hindú Wills Act, XXI of 1870, sec. 6. See above, p. 313.

⁶ This section (rather out of place in a preliminary chapter) should be placed with the other sections (43, 44, 45) relating to marriage. It does not

operate upon the moveable property of parties to a marriage where either of them has a non-Indian domicile and the marriage takes place in India. It does not apply to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindú, Muhammadan, Buddhist, Sikh or Jaina religion, Act III of 1874, sec. 2. But with this exception it declares the general *lex loci* of India, while sec. 44 lays down a special rule in a particular case, 1 Cal. 412, 420. Sec. 4 does not affect rights (e.g. an inchoate right to dower) acquired before the passing of the Act, 6 Cal. 794, and of course it does not prevent the operation of a clause in restraint of anticipation, 13 Ben. 383, where the marriage was contracted after 1866.

PART II.

OF DOMICILE¹.

Law regulating succession to a deceased person's immovable and moveable property, respectively.

5. Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death². Succession to the moveable property of a person deceased is regulated by the law of the country³ in which he had his domicile at the time of his death.

Illustrations.

(a) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

(b) A, an Englishman having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

One domicile only affects succession to moveables.

6. A person can only have one domicile for the purpose of succession to his moveable property.

Domicile of origin of person of legitimate birth.

7. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled: or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

¹ This Part does not apply to Hindús etc., Act XXI of 1870, *supra*, p. 313.

² 1 Bourn. 210. This rule does not apply to property held in British India by a foreign or feudatory State. Such a State is regarded as a quasi-

corporation which continues to exist as a State so long as it is recognised as such by Her Majesty, 11 Cal. 25.

³ Whether generally applicable to the subjects of that country, or applicable only to foreigners domiciled therein, *Collier v. Rivaz*, 2 Curt. 855.

Illustration.

At the time of the birth of *A*, his father was domiciled in England. *A*'s domicile of origin is in England, whatever may be the country in which he was born.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

Domicile of origin of illegitimate child.

9. The domicile of origin prevails until a new domicile has been acquired.

Continuance of domicile of origin.

10. A man¹ acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Acquisition of new domicile.

Explanation.—A man is not considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's Civil or Military Service, or in the exercise of any profession or calling².

Illustrations.

(a) *A*, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(b) *A*, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. *A* has acquired a domicile in Austria.

(c) *A*, whose domicile of origin is in France, comes to reside in British India under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(d) *A*, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

¹ Sec. 3, cl. 1.

² That this does not apply to cases where the deceased acquired an Anglo-Indian domicile before this Act came into force see *In the Goods of Elliott*, 4 Cal. 106, following *Wauchope v. Wauchope*, 4 Ct. of Sess. Cases, 4th series, 945. Down to the extinction

of the East India Company the rule was that officers of the Crown coming to India did not lose their domicile of origin, but that officers of the Company did; *Forbes v. Forbes*, Kay 341; *Jopp v. Wood*, 4 De G., J. & S. 616.

(e) A, having gone to reside in British India under the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(f) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(g) A, having come to Calcutta under the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

Special
mode of
acquiring
domicile in
British
India.

11. Any person may acquire a domicile in British India by making and depositing in some Office in British India (to be fixed by the Local Government¹) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

Ambas-
sadors and
consuls.

12. A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country, does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment²; nor does any other person acquire such domicile by reason only of residing with him as part of his family or as a servant.

Continu-
ance of new
domicile.

13. A new domicile continues until the former domicile has been resumed³, or another has been acquired.

Minor's
domicile.

14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

¹ The following offices have been fixed under this section: the office of the Registrar of Bombay; the Secretariat Office, N. W. Provinces; and the respective offices of the Judicial Commissioners of Oudh, the Central Provinces, and Burma. It is probable that offices have been similarly fixed by the Local Governments of Bengal, Madras, and the Panjáb; but I cannot find the notifications.

² But apparently a consul who resided in British India chiefly for purposes of trade would acquire a British Indian domicile.

³ Slighter evidence is required to show that a man intends to abandon an acquired domicile and to resume his domicile of origin than to show that he means to abandon his domicile of origin and to acquire a new one, *Lord v. Colvin*, 4 Drew. 422.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married¹ or holds any office or employment in the service of Her Majesty, or has set up, with the consent of the parent, in any distinct business².

15. By marriage a woman acquires the domicile of her husband³, if she had not the same domicile before.

Domicile acquired on marriage. Wife's domicile during marriage.

16. The wife's domicile during the marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they be separated by the sentence of a competent Court⁴, or if the husband is undergoing a sentence of transportation⁵.

17. Except in the cases above provided for, a person cannot during minority acquire a new domicile.

Minor cannot acquire a new domicile. Lunatic's acquisition of new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person⁶.

19. If a man⁷ dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

Succession to moveable property in India, in absence of proof of domicile elsewhere.

¹ For on marriage he founds, as a rule, a separate establishment, and is treated, in respect of domicile, as *sui juris*.

² Then he becomes emancipated and capable of acquiring a domicile of his own.

³ And by remarriage she acquires the domicile of her second husband, Phillimore, *The Law of Domicile*, p. 27.

⁴ A sentence of divorce *a mensa et thoro* or one of judicial separation is sufficient, *Dolphin v. Robins*, 7 H. L.

Ca. 416. Not so mere living apart under a separation-deed. That in the case of persons domiciled in British India a foreign court is not a 'competent court,' see *Shaw v. Atty. Gen.* L. R. 2 P. & D. 156.

⁵ Or runs away from his creditors to a foreign country, *Pitt v. Pitt*, 10 Jur. N.S. 735.

⁶ e.g. his father, his committee (Phill. *Domicile*, 55), or (if the lunatic be a married woman) her husband.

⁷ Sec. 3, cl. 1.

PART III.

OF CONSANGUINITY¹.

Consanguinity defined. **20.** Kindred or consanguinity is the connexion or relation of persons descended from the same stock or common ancestor.

Lineal consanguinity. **21.** Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather, and great-grandfather, and so upwards in the direct ascending line; or between a man, his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation constitutes a degree, either ascending or descending. A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third.

Collateral consanguinity. **22.** Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other. For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.

Persons held for purpose of succession to be similarly re- **23.** For the purpose of succession, there is no distinction between those who are related to a person deceased through his father and those who are related to him through his mother; nor between those who are related to him by the

¹ This Part does not apply to *Pársis* (Act XXI of 1865, sec. 8), nor to *Hindús*, etc., Act XXI of 1870, *supra*, p. 313.

full blood, and those who are related to him by the half blood; nor between those who were actually born in his lifetime, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

24. In the annexed table of kindred the degrees are computed as far as the sixth, and are marked by numeral figures.

lated to the deceased.
Mode of computing degrees of kindred.

The person whose relatives are to be reckoned, and his cousin-german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor the grandfather; and from him one of descent to the uncle, and another to the cousin-german; making in all four degrees.

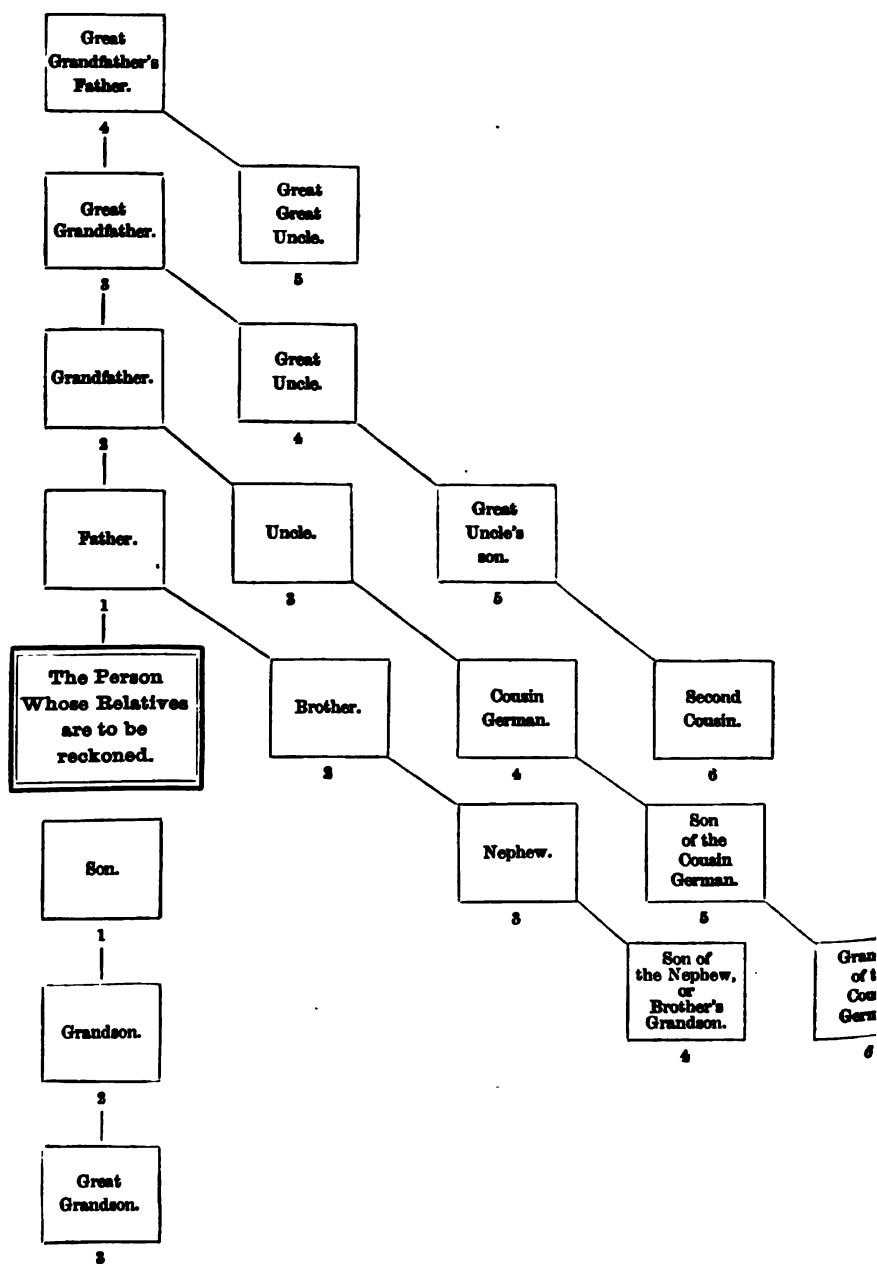
A grandson of the brother and a son of the uncle, i.e. a great-nephew and a cousin-german, are in equal degree, being each four degrees removed.

A grandson of a cousin-german is in the same degree as the grandson of a great-uncle, for they are both in the sixth degree of kindred¹.

¹ As to the meaning in a will of the terms 'cousin,' 'first cousin,' 'cousin-german,' and 'second cousin,' see sec.

86, *infra*. They would probably have the same meanings in sec. 24.

TABLE OF CONSANGUINITY.



PART IV.

OF INTESTACY¹.

25. A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect ².

As to what property a deceased person is considered to have died intestate.

Illustrations.

(a) *A* has left no Will. He has died intestate in respect of the whole of his property.

(b) *A* has left a Will, whereby he has appointed *B* his executor; but the Will contains no other provisions. *A* has died intestate in respect of the distribution of his property³.

(c) *A* has bequeathed his whole property for an illegal purpose. *A* has died intestate in respect of the distribution of his property.

(d) *A* has bequeathed 1,000*l.* to *B*, and 1,000*l.* to the eldest son of *C*, and has made no other bequest; and has died leaving the sum of 2,000*l.* and no other property. *C* died before *A* without having ever had a son. *A* has died intestate in respect of the distribution of 1,000*l.*

26. Such property devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules herein prescribed.

Devolution of such property.

Explanation.—The widow is not entitled to the provision hereby made for her, if by a valid contract made before her marriage she has been excluded from her distributive share of her husband's estate ⁴.

¹ This Part does not apply to Hindús etc., Act XXI of 1870, *supra*, p. 313.

² This section applies to *Pársís*; but the rest of Part V does not do so.

³ The appointment of *B* as executor does not operate as a testamentary disposition in his favour of any part of the testator's property. This has been the law in India since 1 Jan. 1842, Act XXIV of 1841 = the

Stat. 11 Geo. IV & 1 Will IV, c. 40.

⁴ So in England the widow's title under the Statute of Distributions may be barred by an antenuptial settlement excluding her from her distributive share of her husband's estate; and even in the case of a female infant she may be barred of her right by such a settlement if made with the approbation of her parents and guardians.

Where
intestate
leaves
widow and
lineal de-
scendants,
or widow
and
kindred
only, or
widow and
no kindred.

27. Where the intestate has left a widow, if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules herein contained. If he has left no lineal descendant, but has left persons who are of kindred¹ to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules herein contained. If he has left none who are of kindred to him, the whole of his property shall belong to his widow².

Where the
intestate
has left no
widow, and
where he
has left no
kindred.

28. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules herein contained: and if he has left none who are of kindred to him, it shall go to the Crown³.

¹ A wife divorced *a mensa et toro*, and not subsequently reconciled, is one of the next of kin and entitled under the Statute, *Rolfe v. Perry*, 32 L. J. Ch. 149.

² As to the rule in England, see 8 Sim. 214.

³ But subject to the intestate's debts, if any. As to the distribution of the effects of intestate bastards which have escheated before 31 March,

1873, see *Gazette of India*, April 5, 1873, Part I, p. 334. Where the bastard having no relations makes a will bequeathing part only of his property, the Crown has a right to a grant save and except, or to a *caeterorum* grant, but not to a general grant, and the legatee has a right to a grant of administration *c. t. a.*, limited to the property disposed of by the will; *In the Goods of Rhoades*, L. R. 1 Prob. 119.

PART V.

OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY ¹.

(a) *Where he has left lineal descendants.*

29. The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants are as follows:—

Rules of distribution among descendants.

30. Where the intestate has left surviving him a child ² or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there be only one, or shall be equally divided among all his surviving children.

Where the intestate has left a child or children only.

31. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren, and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild, if there be only one, or shall be equally divided among all his surviving grandchildren³.

Where he has left no child, but a grandchild or grandchildren.

Illustrations.

(a) A has three children, and no more; John, Mary, and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren shall have one-ninth.

(b) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

(c) A has two children, and no more; John and Mary. John

¹ This Part does not apply to *Pársís* (Act XXI of 1865), nor to *Hindús*, Act XXI of 1870, *supra*, p. 313.

² 'Child' here would probably be held to mean a child legitimate according to the law of the country

where its parents are domiciled at the time of its birth; *In re Wright*, 2 K. & J. 595.

³ They are the next of kin, and accordingly take in their own right *per capita*.

dies before his father, leaving his wife pregnant. Then *A* dies, leaving Mary surviving him, and in due time a child of John is born. *A*'s property is to be equally divided between Mary and such posthumous child¹.

Where he has left only great-grand-children.

32. In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

Where he leaves lineal descendants not all in same degree of kindred to him and those through whom the more remote descendants are dead.

33. If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him; and one of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(a) *A* had three children, John, Mary, and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of *A* intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(b) *A* left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild; and the remaining one-ninth is equally divided between the two great-grandchildren.

¹ This illustrates sec. 33 rather than sec. 31.

(c) A has three children, John, Mary, and Henry. John dies leaving four children, and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry; one-third to Mary's child; and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren¹.

(b) *Where the Intestate has left no lineal descendants.*

34. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) are as follows:—

Where he has left no lineal descendants.

35. If the intestate's father be living, he shall succeed to the property.

Where his father is living.

36. If the intestate's father is dead, but the intestate's mother is living, and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Where his father is dead but his mother, brothers and sisters are living.

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother, but not of his father. The mother takes one-fourth, each brother takes one-fourth, and Mary, the sister of half blood, takes one-fourth.

37. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister, and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother² and each living brother or sister³, and the living child or children of each deceased brother or sister³, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where his father is dead and his mother, a brother or sister, and children of any deceased brother or sister are living.

¹ See in England *In re Ross's Trust*, L. R. 13 Eq. 286.

² So in England, since 1 Jac. II. c. 7. s. 7, the mother in such case

only shares with brothers and sisters, nephews and nieces.

³ whether of the whole or the half blood.

Illustration.

A the intestate leaves his mother, his brothers John and Henry, and also one child of a deceased sister Mary, and two children of George, a deceased brother of the half blood, who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each take one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

Where his father is dead and his mother and the children of deceased brother or sister are living.

38. If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A the intestate leaves no brother or sister, but leaves his mother and one child of a deceased sister Mary, and two children of a deceased brother George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

Where his father is dead, but his mother living and no brother etc.

39. If the intestate's father is dead, but the intestate's mother is living, and there is neither brother nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

Where he has left neither lineal descendant nor father nor mother.

40. Where the intestate has left neither lineal descendant nor father nor mother, the property is divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death¹.

Where he has left neither lineal descendant, nor parent, nor brother nor sister.

41. If the intestate left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

¹ The grandparents, if any, in such case take nothing. So in England.

Illustrations.

(a) A, the intestate, has left a grandfather and a grandmother, and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(b) A, the intestate, has left a great-grandfather or great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree shall take equal shares.

(c) A, the intestate, left a great-grandfather, an uncle, and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree shall take equal shares.

(d) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They shall each take one-eleventh of the property.

42. Where a distributive share in the property of a person¹ who has died intestate shall be claimed by a child, or any descendant of a child of such person, no money or other property which the intestate may during his life have paid, given, or settled to or for the advancement of the child by whom or by whose descendant the claim is made, shall be taken into account in estimating such distributive share².

¹ whether a man or a woman.

² This repeals, in effect, the provision as to advancement contained in the Statute of Distribution (22 & 23 Car. II, c. 10), sec. 5. And although *Páris* have been excluded

by Act XXI of 1865, sec. 8, from sec. 42 of Act X of 1865, nevertheless the English provision has not been kept in force for that community, 2 Bom. 75.

¹ Children's advancements not brought into hotch pot.

PART VI.

OF THE EFFECT OF MARRIAGE AND MARRIAGE SETTLEMENTS ON PROPERTY¹.

Rights of
widower
and widow
respect-
ively.

43. The husband surviving his wife has the same rights in respect of her property, if she die intestate, as the widow has in respect of her husband's property, if he die intestate².

Rights
how
affected by
marriage
in India of
persons of
whom one
is and one
is not
domiciled
in India.

44. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage³.

Settlement
of minor's
property in
contempla-
tion of
marriage.

45. The property⁴ of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or if he be dead or absent from British India, with the approbation of the High Court⁵.

¹ This Part does not apply to Hindús etc. (Act XXI of 1870).

² This section does not apply to Páráís, Act XXI of 1865, sec. 8.

³ 1 Cal. 420. The meaning is this: where either of the parties has an Indian domicile, all his or her rights, as regards the other's property, whether moveable or immoveable, are regulated by the territorial law of India. 'To

that extent,' said Markby J. (p. 421), 'the *jus gentium* or common law of nations has been set aside or modified.'

⁴ whether moveable or immoveable. Formerly a female infant's realty could not be bound by the settlement, *Simson v. Jones*, 2 R. & M. 376.

⁵ Secs. 44 and 45 apply to Páráís, Act XXI of 1865, sec. 8.

PART VII.

OF WILLS AND CODICILS.

46. Every person of sound mind¹ and not a minor² may dispose of his property by Will. Persons capable of making Wills.

Explanation 1.—A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf, or dumb, or blind³ are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.—One who is ordinarily insane may make a Will during an interval in which he is of sound mind⁴.

Explanation 4.—No person can make a Will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing⁵.

Illustrations.

(a) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the

¹ He must be able to understand (a) that he is giving property to the object of his bounty, (b) the extent of the property, and (c) the claims of those (if any) whom the will excludes from participation, *Harwood v. Baker*, 3 Moore, P. C. 282.

² See definition of 'minor,' sec. 2, *supra*, and note thereon. A minor father may appoint a testamentary guardian, sec. 47.

³ As to persons who are deaf and dumb from birth, see *Harrod v. Harrod*, 1 K. & J. 4: *In the goods of Owston*, 2 Sw. & T. 461: *In the goods of Geale*, 3 Sw. & T. 431. As to persons deaf and dumb and blind, see Co. Litt. 42^b.

⁴ Whoever sets up the will in such

a case must prove that it was made in a lucid interval, as to which see *White v. Driver*, 1 Phillim. 88. Where a lunatic purports to make a will and afterwards having become sane republishes the document as his will, it becomes valid, *Wms. Exors.*, 8th ed. 229.

⁵ This section applies to the wills of Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay (Act XXI of 1870). A Hindú widow may therefore apparently dispose by will of accumulations of income derived from her late husband's estate and in her hands at her death, § Cal. 512, where, however, the point, though raised, was not decided.

persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. *A* cannot make a valid Will.

(*b*) *A* executes an instrument purporting to be his Will, but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid Will.

(*c*) *A* being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes his Will. This is a valid Will.

Testa-
mentary
guardian.

47. A father, whatever his age may be, may by Will appoint a guardian or guardians for his child during minority¹.

Will ob-
tained by
fraud,
coercion
or impor-
tunity.

48. A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void².

Illustrations.

(*a*) *A* falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act, and thereby induces the testator to make a Will in his, *A*'s favour; such Will has been obtained by fraud, and is invalid.

(*b*) *A* by fraud and deception prevails upon the testator to bequeath a legacy to him. The bequest is void.

(*c*) *A*, being a prisoner by lawful authority, makes his Will. The Will is not invalid by reason of the imprisonment.

(*d*) *A* threatens to shoot *B*, or to burn his house, or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of *C*. *B* in consequence makes a bequest in favour of *C*. The bequest is void, the making of it having been caused by coercion.

(*e*) *A* being of sufficient intellect, if undisturbed by the influence of others, to make a Will, yet being so much under the control of *B* that he is not a free agent, makes a Will dictated by *B*. It appears that he would not have executed the Will but for fear of *B*. The Will is invalid.

(*f*) *A* being in so feeble a state of health as to be unable to resist importunity, is pressed by *B* to make a Will of a certain purport, and does so merely to purchase peace, and in submission to *B*. The Will is invalid.

(*g*) *A* being in such a state of health as to be capable of exer-

¹ So in England since 12 Car. II, c. 24, s. 8: 'child' here means legitimate child. Where *A* and *B* are appointed testamentary guardians and *A* dies, the office survives without express words, 2 P. Wms. 102. Sec. 47 does

not extend to Hindús.

² This section applies to the wills of Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

cising his own judgment and volition, *B* uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. *A*, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his Will in the manner recommended by *B*. The Will is not rendered invalid by the intercession and persuasion of *B*¹.

(*h*) *A* with a view to obtaining a legacy from *B*, pays him attention and flatters him, and thereby produces in him a capricious partiality to *A*. *B*, in consequence of such attention and flattery, makes his Will, by which he leaves a legacy to *A*. The bequest is not rendered invalid by the attention and flattery of *A*.

49. A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will². Will may be revoked or altered.

¹ *Morison v. Administrator-General of Madras*, 7 Mad. 515.

Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

² This section applies to the wills of

PART VIII.

OF THE EXECUTION OF UNPRIVILEGED WILLS¹.

Execution
of unprivi-
leged Wills.

50. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his Will according to the following rules:—

First.—The testator shall sign or shall affix his mark to the Will, or it shall be signed² by some other person³ in his presence and by his direction.

Second.—The signature or mark of the testator or the signature⁴ of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will⁵.

Third.—The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person⁶ sign the Will in the presence⁷ and by the direction of the testator, or have received from the testator a personal acknowledgment⁸ of his signature or mark, or of the signature of such other person; and each of the witnesses must sign⁹ the

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

² Not marked.

³ i.e. some person other than the testator and the attesting witnesses, 11 Bom. H. C. 87.

⁴ Not the mark.

⁵ In India Natives executing documents usually sign them at the top, and in the case of a Hindú's will such a signature may be valid. Even in the case of Europeans it is not necessary that the signature should be at the end of the will.

⁶ i.e. not only some person other than the testator, but also some person other than the attesting witnesses, 11 Bom. H. C. 88. It is not enough for the witness merely to write on the will words signifying 'This is the testator's signature,' 13 Ben. 392.

⁷ To hold that, when A is in such a position that B may see what he is doing, A is in B's presence, is the largest permissible latitude of construction, 3 N. W. P. 32, 35.

⁸ As to what is a sufficient acknowledgment, see 1 Bom. 547, where the testator produced a paper, made the witnesses understand that it was his will, and the Court was satisfied that his signature was on the will when the witnesses attested it. Acknowledgment before a Registrar of Assurances is of course enough, 6 Cal. 17: 1 Cal. 150.

⁹ This direction is not satisfied by the witnesses affixing their marks, 3 Bom. 382 (dissenting from Pontifex J. in 13 Ben. 392): 11 Cal. 429. And the witnesses must sign after the testator has executed, 6 Cal. 17: 5 Cal. 738: 24 W. R. 322: 3 Bom. 382.

Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time¹; and no particular form of attestation shall be necessary².

51. If a testator, in a Will or Codicil duly attested, refers to any other document then actually written³, as expressing any part of his intentions, such document shall be considered as forming a part of the Will or Codicil in which it is referred to.

Incorporation of papers by reference.

¹ Both witnesses therefore need not be present when the testator signs or acknowledges. Otherwise in the case of a privileged will; see sec. 53, cl. 6, *infra*.

² When the testator does not himself sign, but some other person signs in his presence and by his direction, then, besides this other person, there must be two witnesses. In other words, there must be, in such cases, three persons in addition to the testator himself, 9 Cal. 229.

In sec. 50, the word 'will' must be

taken to include 'codicil'—otherwise there would be no rule as to the execution of codicils.

The form of attestation may be: 'Signed by the above *A. B.* (*the testator*) in the presence of us, who have hereunto signed our names as witnesses thereto in the presence of the said *A. B.*' They need not sign in the presence of each other.

³ 'written' here would probably be construed as including 'printed,' 'engraved,' 'lithographed,' etc.

PART IX.¹

OF PRIVILEGED WILLS.

Privileged
Will.

52. Any soldier being employed in an expedition², or engaged in actual warfare, or any mariner³ being at sea, may, if he has completed the age of eighteen years, dispose of his property by a Will made as is mentioned in the fifty-third section. Such Wills are called privileged Wills.

Illustrations.

(a) *A*, the surgeon of a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged Will.

(b) *A* is at sea in a merchant ship, of which he is the purser. He is a mariner, and being at sea can make a privileged Will.

(c) *A*, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged Will.

(d) *A*, a mariner of a ship in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged Will.

(e) *A*, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged Will.

(f) *A*, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged Will.

Mode of
making,
and rules
for execut-
ing, privi-
leged Wills.

53. Privileged Wills may be in writing, or may be made by word of mouth. The execution of them shall be governed by the following rules:—

First.—The Will may be written wholly by the testator, with his own hand. In such case it need not be signed nor attested.

¹ This Part does not apply to Hindús etc., Act XXI of 1870, *supra*, p. 313.

² But the informal will of a soldier in command of the Mysore division of the army, who died while on a

tour of inspection of the troops, was held not to be privileged, *In the goods of Hill*, 1 Rob. 276.

³ This would include a surgeon, purser, or engineer.

Second.—It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

Third.—If the instrument purporting to be a Will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his Will, if it be shown that it was written by the testator's directions, or that he recognised it as his Will. If it appear on the face of the instrument that the execution of it in the manner intended by him was not completed, the instrument shall not by reason of that circumstance be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

Fourth.—If the soldier or mariner shall have written instructions for the preparation of his Will, but shall have died before it could be prepared, and executed, such instructions shall be considered to constitute his Will.

Fifth.—If the soldier or mariner shall in the presence of two witnesses have given verbal instructions for the preparation of his Will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his Will, although they may not have been reduced into writing in his presence, nor read over to him.

Sixth.—Such soldier or mariner as aforesaid may make a Will by word of mouth by declaring his intentions before two witnesses present at the same time.

Seventh.—A Will made by word of mouth shall be null at the expiration of one month after the testator shall have ceased to be entitled to make a privileged Will¹.

¹ In *In re Godby*, 1 Hyde, 196, Morgan J. held that a military testament, valid in its inception, was deprived of its privileges by the lapse of five years. See in England *In the*

Goods of Leese, 17 Jur. 216. As to wills of seamen in the Royal Navy, see 28 & 29 Vic. c. 72; and as to wills of merchant seamen, 17 & 18 Vic. c. 104, s. 200.

PART X.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

Effect of
gift to
attesting
witness.

54. A Will shall not be considered as insufficiently attested by reason of any benefit thereby¹ given, either by way of bequest or by way of appointment, to any person attesting it, or to his or her wife or husband: but the bequest or appointment shall be void so far as concerns the person so attesting², or the wife or husband of such person³, or any person claiming under either of them.

Explanation.—A legatee under a Will does not lose his legacy by attesting a Codicil which confirms the Will⁴.

Witness
not dis-
qualified by
interest or
by being
executor.

55. No person, by reason of interest in or of his being an executor of a Will, is disqualified as a witness to prove the execution of the Will or to prove the validity or invalidity thereof⁵.

Revocation
of Will by
testator's
marriage.

56. Every Will shall be revoked by the marriage of the maker⁶, except a Will made in exercise of a power of appointment, when the property over which the power of appointment

¹ This indicates that the bequest is given by the same testamentary instrument which is attested, 3 Drew. 209.

² even though his attestation was not required to validate the will, 4 Mad. 244; as where there are more witnesses than the necessary two.

³ But where A made a bequest to B, and one of the attesting witnesses was B's wife, and then A made a codicil attested by other witnesses and confirming his will, the bequest to B was held valid, L. R. 13 Eq. Ca. 381, the codicil having the effect of republishing and incorporating the will. A residuary legatee of a share of a residue does not lose it by attesting a codicil, which, by revoking legacies, increases the residuary share,

Gurney v. Gurney, 3 Drew. 208.

⁴ This section does not apply to Hindús etc., Act XXI of 1870. The legatee therefore of a testator to whom that Act applies does not lose his legacy by attesting the will, and collusion is encouraged by the prospect of benefit.

⁵ This section applies to the wills of Hindús etc., Act XXI of 1870.

⁶ The will of a Jew, inhabitant of Calcutta, made after his first marriage, but previously to a second marriage in the lifetime of his first wife, was held by Phear J. to be revoked under this section, 1 Cal. 148. But, as the will was made in 1856, this section did not apply: see *infra*, sec. 331.

is exercised would not in default of such appointment pass to his or her executor, or administrator, or to the person entitled in case of intestacy¹.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

Power of appointment defined.

57. No unprivileged Will or Codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or Codicil², or by some writing declaring an intention³ to revoke the same, and executed in the manner in which an unprivileged Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying⁴ the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same⁵.

Revocation of unprivileged Will or Codicil.

Illustrations.

(a) A has made an unprivileged Will; afterwards A makes another unprivileged Will which purports to revoke the first. This is a revocation.

(b) A has made an unprivileged Will. Afterwards, A being entitled to make a privileged Will, makes a privileged Will, which purports to revoke his unprivileged Will. This is a revocation.

¹ This section does not apply to Hindús etc., Act XXI of 1870.

² The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revokes the former, or the two are incapable of standing together; any number of testamentary papers may be admitted to probate as together containing the last will of the deceased, *Wms. Exors.*, cited and approved in *Lemage v. Goodban*, L. R. 1 P. & D. 57, 62.

³ The intention must be present: words declaring only a future intention to revoke, e.g. by a codicil, are insufficient.

⁴ By modes of destruction *eiusdem generis*, as cutting, throwing into the water, or the like; and therefore the words of the section exclude cancelling or incomplete erasure or obliteration. It is enough if an essential part of the will, such as the

testator's name or the names of the attesting witnesses, be cut out, burnt, torn off, or completely erased or obliterated, with the intention to revoke, *Brooks v. Kent*, 3 Moo. P. C. 334.

The destruction by the testator of one of two duplicate wills is presumed to be a destruction of both, *Muddomohan Mullick*, 2 Boul. 90.

⁵ This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870. The Succession Act is silent as to the doctrine of 'dependent relative revocation,' which is applied where a testator destroys one will with the sole intention of setting up another. If the latter will is void, the former is not revoked, *Powell v. Powell*, L. R. 1 P. & D. 209. The Act is also silent as to the rule that a will made for valuable consideration cannot be revoked, *Loffus v. Maw*, 3 Giff. 592.

Effect of
obliteration,
interlineation,
or alteration
in unprivileged
Will.

58. No obliteration, interlineation, or other alteration made in any unprivileged Will after¹ the execution thereof shall have any effect, except so far as the words or meaning of the Will shall have been thereby rendered illegible or undiscernible², unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; save that the Will, as so altered, shall be deemed to be duly executed if the signature³ of the testator and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will⁴.

Revocation
of privileged
Will or
Codicil.

59. A privileged Will or Codicil may be revoked by the testator, by an unprivileged Will or Codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged Will, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged Will or Codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged Will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged Will⁴.

Revival of
unprivileged
Will.

60. No unprivileged Will or Codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution⁵ thereof, or by a Codicil executed

¹ The evidence of an expert in handwriting is receivable to show that alterations and interlineations were made at the same time that the will was written, *In the goods of Hindmarch*, 36 L. J. Prob. 24.

² As to the inadmissibility of parol evidence to show what the obliterated writing was, see *Townley v. Watson*, 3 Curt. 767.

³ The case where the testator is a marksman seems forgotten.

⁴ This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

In sec. 58, as in sec. 50, supra, 'will' must be taken to include 'codicil.'

⁵ *Dunn v. Dunn*, L. R. 1 P. & D. 277, where the signatures were affixed to the will as evidence that it was handed over to the executor.

in manner hereinbefore described, and showing an intention to revive the same¹; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the Will or Codicil².

¹ The destruction of the revoking instrument is, therefore, not enough.

² The words 'by the will or codicil' were added in committee with the view of excluding parol evidence to show how a revival was intended to operate in cases where it may be doubtful whether the whole or part

of a will, which was first partly and then wholly revoked, was intended to be revived.

Sec. 60 applies to the wills of Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

PART XI.

OF THE CONSTRUCTION OF WILLS.

Wording
of Will.

61. It is not necessary that any technical words or terms of art shall be used in a Will, but only that the wording shall be such that the intentions of the testator can be known therefrom¹.

Enquiries
to deter-
mine ques-
tions as to
object or
subject of
Will.

62. For the purpose of determining questions as to what person or what property is denoted by any words used in a Will, a Court must inquire into every material fact relating to the persons who claim to be interested under such Will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

(a) *A*, by his Will, bequeaths 1,000 rupees to his eldest son, or to his youngest grandchild, or to his cousin Mary. A Court may make enquiry in order to ascertain to what person the description in the Will applies.

(b) *A*, by his Will, leaves to *B* 'his estate called Black Acre.' It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(c) *A*, by his Will, leaves to *B* 'the estate which he purchased of *C*.' It may be necessary to take evidence in order to ascertain what estate the testator purchased of *C*².

Misnomer
or misde-
scription of
object.

63. Where the words used in the Will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the

¹ The intention must appear either by express words or by plain implication. Sec. 61 applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay.

² This section applies to Hindús

etc. in the Lower Provinces and in the towns of Madras and Bombay. In illustration (a) 'son' would include an adopted son. See Act XXI of 1870, sec. 6, *supra*, p. 314.

name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(a) *A* bequeaths a legacy 'to Thomas, the second son of his brother John.' The testator has an only brother, named John, who has no son named Thomas, but has a second son whose name is William. William shall have the legacy.

(b) *A* bequeaths a legacy 'to Thomas, the second son of his brother John.' The testator has an only brother named John, whose first son is named Thomas, and whose second son is named William. Thomas shall have the legacy.

(c) The testator bequeaths his property 'to *A* and *B*, the legitimate children of *C*.' *C* has no legitimate child, but has two illegitimate children, *A* and *B*. The bequest to *A* and *B* takes effect, although they are illegitimate.

(d) The testator gives his residuary estate to be divided among 'his seven children,' and proceeding to enumerate them, mentions six names only. This omission shall not prevent the seventh child from taking a share with the others.

(e) The testator having six grandchildren, makes a bequest to 'his six grandchildren,' and proceeding to mention them by their Christian names, mentions one twice over, omitting another altogether. The one whose name is not mentioned shall take a share with the others.

(f) The testator bequeaths '1,000 rupees to each of the three children of *A*.' At the date of the Will, *A* has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees¹.

64. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context. When words may be supplied.

Illustration.

The testator gives a legacy of 'five hundred' to his daughter *A*, and a legacy of 'five hundred rupees' to his daughter *B*. *A* shall take a legacy of five hundred rupees.

65. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the Will, but some parts of the description do not apply, Rejection of erroneous particulars in description of subject.

¹ This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay—'son' and 'children' (in the illustrations) including an adopted child,

and 'grandchildren' including the children, whether adopted or natural-born, of a child, whether adopted or natural-born, Act XXI of 1870, sec. 6.

such parts of the description shall be rejected as erroneous, and the bequest shall take effect ¹.

Illustrations.

(a) *A* bequeaths to *B* 'his marsh lands lying in *L*, and in the occupation of *X*.' The testator had marsh lands lying in *L*, but had no marsh lands in the occupation of *X*. The words 'in the occupation of *X*' shall be rejected as erroneous, and the marsh lands of the testator lying in *L* shall pass by the bequest.

(b) The testator bequeaths to *A* 'his zamíndarí of Rámpur.' He had an estate at Rámpur, but it was a taluk and not a zamíndarí. The taluk passes by this bequest.

When part
of descrip-
tion may
not be re-
jected as
erroneous.

66. If the Will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under the sixty-fifth section are to be considered as struck out of the Will.

Illustrations.

(a) *A* bequeaths to *B* 'his marsh lands lying in *L*, and in the occupation of *X*.' The testator had marsh lands lying in *L*, some of which were in the occupation of *X*, and some not in the occupation of *X*. The bequest shall be considered as limited to such of the testator's marsh lands lying in *L* as were in the occupation of *X*.

(b) *A* bequeaths to *B* 'his marsh lands lying in *L*, and in the occupation of *X*, comprising 1,000 bighás of land.' The testator had marsh lands lying in *L*, some of which were in the occupation of *X* and some not in the occupation of *X*. The measurement is wholly inapplicable to the marsh lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the Will, and such of the testator's marsh lands lying in *L*, as were in the occupation of *X*, shall alone pass by the bequest ².

¹ *Falsa demonstratio non nocet.*
This section applies to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² Applies to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

67. Where the words of the Will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended ¹.

Extrinsic evidence admissible in case of latent ambiguity.

Illustrations.

(a) A man having two cousins of the name of Mary, bequeaths a sum of money to 'his cousin Mary.' It appears that there are two persons, each answering the description in the Will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(b) A, by his Will, leaves to B 'his estate called Sultānpur Khurd.' It turns out that he had two estates called Sultānpur Khurd. Evidence is admissible to show which estate was intended ².

68. Where there is an ambiguity or deficiency on the face of the Will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency.

Illustrations.

(a) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his Will he bequeaths 1,000 rupees to 'his aunt Caroline' and 1,000 rupees to 'his cousin Mary,' and afterwards bequeaths 2,000 rupees to 'his before-mentioned aunt Mary.' There is no person to whom the description given in the Will can apply, and evidence is not admissible to show who was meant by 'his before-mentioned aunt Mary.' The bequest is therefore void for uncertainty under the seventy-sixth section.

(b) A bequeaths 1,000 rupees to _____, leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(c) A bequeaths to B _____ rupees, or 'his estate of _____.' Evidence is not admissible to show what sum or what estate the testator intended to insert ².

69. The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a Codicil is to be considered as part of the Will.

Meaning of any clause to be collected from entire Will.

¹ Parol evidence of intention is only admissible to show which of the persons or things was intended, and not (e.g.) to show that the words were used in a sense which would

include more than one of them.

² Applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870, supra, p. 313.

Illustrations.

(a) The testator gives to *B* a specific fund or property at the death of *A*, and by a subsequent clause gives the whole of his property to *A*. The effect of the several clauses taken together is to vest the specific fund or property in *A* for life, and after his decease in *B*; it appearing from the bequest to *B* that the testator meant to use in a restricted sense the words in which he describes what he gives to *A*.

(b) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to *A*, and in another part of his Will bequeaths Black Acre to *B*, the latter bequest is to be read as an exception out of the first, as if he had said, 'I give Black Acre to *B*, and all the rest of my estate to *A* ¹.'

When words may be understood in a restricted sense, and when in a sense wider than usual.

70. General words may be understood in a restricted sense where it may be collected from the Will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear ², where it may be collected from the other words of the Will that the testator meant to use them in such wider sense.

Illustrations.

(a) A testator gives to *A* 'his farm in the occupation of *B*,' and

¹ Applies to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay.

² According to the English courts the following expressions bear the sense annexed to them respectively:—*Articles of domestic use and enjoyment*: this includes books: *Books* includes MSS. bound into volumes: *Cash* does not include a promissory note payable to order: *Debenture* includes a policy of assurance: *Debts* due to the testator includes a bill of exchange drawn in his favour and a cash balance at his banker's; the bequest of a debt due on a particular security passes the capital only, not the arrears of interest due at the testator's death: *Factory* includes the stock, implements, utensils, etc. in and upon it: *Funds* means funded securities guaranteed by Government: *Goods* includes all the personal estate: *Household Effects* includes all property in the house or on the premises, intended for use or consumption therein, or for its ornament or defence: *Household furniture* includes plate, linen, china and pictures, but not goods or plate in possession of the testator by way

of his trade, nor books, nor wines: *Household goods* includes plate and other articles not consumed in their enjoyment, that were used in or required by the testator for his house; it does not include victuals, or fire-arms, or goods in the way of the householder's trade or business: *Linen* includes table and bed-linen: *Money* includes bank-notes, bills of exchange endorsed in blank, and money lent on mortgage: *Ready money* includes a balance at a banker's but not money in the hands of an agent, nor unreceived dividends: *Plate* does not include plated articles: *Securities for money* includes bills of exchange, promissory notes, and a policy of assurance on the life of a debtor; also stock in the funds, and money placed at a banker's on deposit notes; but not shares in an insurance company nor an I.O.U. for goods sold: *Shares in a railway company* may include stock in the company: *Stock on farm* includes all moveables upon or belonging to the farm, and also growing crops: *Utensile* does not include plate or jewels.

to *C* 'all his marsh lands in *L*.' Part of the farm in the occupation of *B* consists of marsh lands in *L*, and the testator also has other marsh lands in *L*. The general words, 'all his marsh lands in *L*,' are restricted by the gift to *A*. *A* takes the whole of the farm in the occupation of *B*, including that portion of the farm which consists of marsh lands in *L*.

(b) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons, and chest of clothes, and to his friend *A* (a shipmate) his red box, clasp-knife, and all things not before bequeathed. The testator's share in a house does not pass to *A* under this bequest.

(c) *A*, by his Will, bequeathed to *B* all his household furniture, plate, linen, china, books, pictures, and all other goods of whatever kind; and afterwards bequeathed to *B* a specified part of his property. Under the first bequest *B* is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated¹.

71. Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred¹.

Clause open to two constructions.

72. No part of a Will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it¹.

No part rejected if capable of reasonable construction.

73. If the same words occur in different parts of the same Will, they must be taken to have been used everywhere in the same sense, unless there appears² an intention to the contrary¹.

Words repeated in different parts of Will.

74. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Testator's intention to be effectuated as far as possible.

Illustration.

The testator by a Will made on his death-bed bequeathed all his property to *C D* for life, and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under the hundred and fifth Section, but it shall take effect so far as regards the gift to *C D*¹.

¹ Applies to *Hindús* etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² on the face of the will, *Harvey*

v. Harvey, 32 Beav. 445. Section 73 would not preclude the Court from putting a different construction on the same words when applied to different subject-matters.

The last of two inconsistent clauses prevails.

75. Where two clauses or gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail ¹.

Illustration.

(a) The testator by the first clause of his Will leaves his estate of Rámnagar 'to A,' and by the last clause of his Will leaves it 'to B and not to A.' B shall have it ².

(b) If a man at the commencement of his Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition shall prevail ³.

Will or bequest void for uncertainty.

76. A Will or bequest not expressive of any definite intention ⁴ is void for uncertainty ⁵.

Illustration.

If a testator says—'I bequeath goods to A;' or 'I bequeath to A;' or 'I leave to A all the goods mentioned in a schedule,' and no schedule is found; or 'I bequeath "money," "wheat," "oil," or the like,' without saying how much, this is void ⁶.

Description of property subject of gift.

77. The description contained in a Will, of property the subject of gift ⁷, shall, unless a contrary intention appear by the Will ⁸, be deemed to refer to and comprise the property answering that description at the death of the testator ⁹.

Power executed by general bequest.

78. Unless a contrary intention shall appear by the Will ⁹, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint ¹⁰ by Will ¹¹ to any object he may think proper ¹², and shall operate

¹ But see secs. 69 and 72, supra.

² In 30 Beav. 226 A bequeathed his residue in trust for B, and afterwards, by the same instrument, appointed C his residuary legatee; the M. R. held that the gift to B was not revoked and that the gift to C might operate on lapsed legacies.

³ Secs. 75, 76, 77 apply to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay.

⁴ A reasonable degree of definiteness will suffice.

⁵ 6 All. 613.

⁶ But a bequest 'of Rs. 500 or Rs. 1000' is a good bequest of Rs. 1000; and effect will be given to a legacy to an executor of a reasonable amount for his trouble.

⁷ Here 'gift' includes a release of debts due to the testator.

⁸ i.e. where the date of the will as opposed to the death is distinctly referred to, or where there is a particularity in the description of the specified subject of gift showing that an object in existence at the date of the will was intended (Hawkins, *On the Construction of Wills*, 20).

⁹ i.e. unless there be something in the will inconsistent with a view that the general devise was meant as an execution of the power.

¹⁰ A power to revoke what has been already appointed is not within the scope of the section.

¹¹ By will only, or 'by deed or will' but not 'by deed.'

¹² A power to appoint in any manner to *children* or any other limited class of objects is not within the section.

as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by Will to any object he may think proper, and shall operate as an execution of such power¹.

79. Where property is bequeathed to or for the benefit of such of certain objects as a specified person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint²; and the Will does not provide for the event of no appointment being made; if the power given by the Will be not exercised³, the property belongs to all the objects of the power in equal shares⁴.

Implied gift to objects of power in default of appointment.

Illustration.

(a) A, by his Will, bequeaths a fund to his wife for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund shall be divided equally among the children¹.

80. Where a bequest is made to the 'heirs,' or 'right heirs,' or 'relations,' or 'nearest relations,' or 'family,' or 'kindred,' or 'nearest of kin,' or 'next of kin,' of a particular person, without any qualifying terms², and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Bequest to heirs &c. of particular person without qualifying terms.

¹ This section does not apply to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² The rule does not apply where there is a mere permission to give to certain objects.

³ If the power has been partially exercised the rule in *Brown v. Higgs* (8 Ves. 561) applies, and the unappointed part is divisible among the objects of the power without regard to the appointment (*Hawk. 61.*)

⁴ There is an implied trust in their favour.

⁵ Or 'friends and relations,' or 'friends or relations,' or 'deserving,' or 'poor' relations.

⁶ In England the primary meaning of 'family' is now 'children' (19 Beav. 580), and 'next-of-kin' means only nearest blood-relations.

⁷ As where the language of the will shows that the testator intended the 'next of kin' etc. to be ascertained at the period of distribution.

Illustrations.

(a) *A* leaves his property 'to his own nearest relations.' The property goes to those who would be entitled to it if *A* had died intestate, leaving assets for the payment of his debts independently of such property.

(b) *A* bequeaths 10,000 rupees 'to *B* for his life, and after the death of *B*, to his own right heirs.' The legacy after *B*'s death belongs to those who would be entitled to it if it had formed part of *A*'s unbequeathed property.

(c) *A* leaves his property to *B*; but if *B* dies before him, to *B*'s next of kin: *B* dies before *A*; the property devolves as if it had belonged to *B*, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(d) *A* leaves 10,000 rupees 'to *B* for his life, and after his decease, to the heirs of *C*.' The legacy goes as if it had belonged to *C*, and he had died intestate, leaving assets for the payment of his debts independently of the legacy¹.

Bequest to
'representatives'
&c. of a
particular
person.

81. Where a bequest is made to the 'representatives' or 'legal representatives,' or 'personal representatives,' or 'executors or administrators' of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it.

Illustration.

A bequest is made to the 'legal representatives' of *A*. *A* has died intestate and insolvent. *B* is his administrator. *B* is entitled to receive the legacy, and shall apply it in the first place to the discharge of such part of *A*'s debts as may remain unpaid: if there be any surplus, *B* shall pay it to those persons who at *A*'s death would have been entitled to receive any property of *A*'s which might remain after payment of his debts, or to the representatives of such persons¹.

Bequest
without
words of
limitation.

82. Where property² is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him³.

¹ This section does not apply to Hindús etc. in the Lower Provinces or in the towns of Madras and Bombay, Act XXI of 1870.

² i.e. property actually vested in the testator or in his power. As to

annuities created by the will, see sec. 160, *infra*.

³ Applies to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

83. Where property is bequeathed to a person¹, with a bequest in the alternative to another person or to a class of persons:—if a contrary intention does not appear by the Will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead the person or class of persons named in the second branch of the alternative shall take the legacy.

Illustrations.

(a) A bequest is made to A or to B. A survives the testator. B takes nothing.

(b) A bequest is made to A or to B. A dies after the date of the Will, and before the testator. The legacy goes to B.

(c) A bequest is made to A or to B. A is dead at the date of the Will. The legacy goes to B.

(d) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.

(e) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearest of kin takes effect².

(f) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.

(g) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect³.

84. Where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the Will.

Effect of words describing a class added to a bequest to a person.

Illustrations.

(a) A bequest is made—

to A and his children,
to A and his children by his present wife,
to A and his heirs,
to A and the heirs of his body,
to A and the heirs male of his body,
to A and the heirs female of his body,

¹ The words 'or to a class of persons' seem omitted intentionally.

² i. e. the 'or' is construed as substitutional, and there is no lapse.

³ Applies to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

to A and his issue,
 to A and his family,
 to A and his descendants,
 to A and his representatives,
 to A and his personal representatives,
 to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(b) A bequest is made to A and his brothers¹. A and his brothers are jointly entitled to the legacy.

(c) A bequest is made to A for life, and after his death to his issue. At the death of A the property belongs in equal shares to all persons who shall then answer the description of issue of A².

Bequest to class under general description only. **85.** Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy³.

Construction of terms. **86.** The word 'children' in a Will applies only to lineal descendants in the first degree⁴; the word 'grandchildren' applies only to lineal descendants in the second degree of the person whose 'children' or 'grandchildren' are spoken of; the words 'nephews' and 'nieces' apply only to children of brothers or sisters; the words 'cousins' or 'first cousins,' or 'cousins-german' apply only to children of brothers or of sisters of the father or mother of the person whose 'cousins,' or 'first cousins,' or 'cousins-german' are spoken of; the words 'first cousins once removed' apply only to children of cousins-german, or to cousins-german of a parent, of the person whose 'first cousins once removed' are spoken of; the words 'second cousins' apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose 'second cousins' are spoken of; the words 'issue' and 'descendants' apply to all lineal descendants whatever of the

¹ Here the brothers, as in ill. (c) the issue, are denoted as direct objects of a distinct and independent gift.

² This section does not apply to Hindús etc. in the Lower Provinces or in the towns of Madras and Bombay, Act XXI of 1870. It agrees generally with the English law as to moveables, but differs in the case of a bequest to

A and his children where there are none living at the date of the will but there are at the testator's death.

³ Applies to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

⁴ by any marriage, unless the will shows a clear intention to exclude children by a particular marriage.

person whose 'issue' or 'descendants' are spoken of. Words expressive of collateral relationship apply alike to relatives of full and of half blood. All words expressive of relationship apply to a child in the womb who is afterwards born alive¹.

87. In the absence of any intimation to the contrary in the Will, the term 'child,' 'son,' or 'daughter,' or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the Will, the reputation of being such relative².

Words expressing relationship denote only legitimate relatives, or failing such, relatives reputed legitimate.

Illustrations.

(a) *A*, having three children, *B*, *C*, and *D*, of whom *B* and *C* are legitimate and *D* is illegitimate, leaves his property to be equally divided among 'his children.' The property belongs to *B* and *C* in equal shares, to the exclusion of *D*.

(b) *A*, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(c) *A*, having in his Will enumerated his children, and named as one of them *B*, who is illegitimate, leaves a legacy to 'his said children.' *B* will take a share in the legacy along with the legitimate children.

(d) *A* leaves a legacy to the 'children of *B*.' *B* is dead, and has left none but illegitimate children. All those who had, at the date of the Will, acquired the reputation of being the children³ of *B* are objects of the gift.

(e) *A* bequeathed a legacy to 'the children of *B*.' *B* never had any legitimate child. *C* and *D* had at the date of the Will acquired the reputation of being children of *B*. After the date of the Will, and before the death of the testator, *E* and *F* were born, and acquired the reputation of being children³ of *B*. Only *C* and *D* are objects of the bequest⁴.

(f) *A* makes a bequest in favour of his child by a certain woman, not his wife. *B* had acquired at the date of the Will the reputation of being the child³ of *A* by the woman designated. *B* takes the legacy.

(g) *A* makes a bequest in favour of his child to be born of a woman, who never becomes his wife. The bequest is void.

¹ This section does not apply to Hindús etc., Act XXI of 1870. Unlike secs. 84, 87, it omits the words 'unless a contrary intention appears by the will.'

² i. e. apparently, 'such legitimate relative.' But see illustrations (d),

(e), and (f).

³ whether legitimate or illegitimate?

⁴ *Mortimer v. West*, 3 Russ. 370. The exclusion of *E* and *F* seems to defeat the testator's intention.

(h) *A* makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid ¹.

Rules of construction where Will purports to make two bequests to same person.

88. Where a Will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the Will to show what he intended, the following rules shall prevail in determining the construction to be put upon the Will:

First.—If the same specific thing is bequeathed twice to the same legatee in the same Will, or in the Will and again in a Codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same Will or one and the same Codicil purports to make in two places a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same Will, or in the same Codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a Will and the other by a Codicil, or each by a different Codicil, the legatee is entitled to both legacies.

Explanation.—In the four last rules, the word Will does not include a Codicil.

Illustrations.

(a) *A* having ten shares, and no more, in the Bank of Bengal made his Will, which contains near its commencement the words ‘I bequeath my ten shares in the Bank of Bengal to *B*.’ After other bequests, the Will concludes with the words, ‘and I bequeath my ten shares in the Bank of Bengal to *B*.’ *B* is entitled simply to receive *A*’s ten shares in the Bank of Bengal.

(b) *A* having one diamond ring, which was given him by *B*, bequeathed to *C* the diamond ring which was given him by *B*. *A* afterwards made a Codicil to his Will, and thereby, after giving other legacies, he bequeathed to *C* the diamond ring which was given him by *B*. *C* can claim nothing except the diamond ring which was given to *A* by *B*.

(c) *A*, by his Will, bequeaths to *B* the sum of 5,000 rupees, and afterwards, in the same Will, repeats the bequest in the same words. *B* is entitled to one legacy of 5,000 rupees only.

¹ This section does not apply to or the towns of Madras and Bombay, Hindús etc. in the Lower Provinces Act XXI of 1870.

(d) *A*, by his Will, bequeaths to *B* the sum of 5,000 rupees, and afterwards, by the same Will, bequeaths to *B* the sum of 6,000 rupees. *B* is entitled to 11,000 rupees.

(e) *A*, by his Will, bequeaths to *B* 5,000 rupees, and by a Codicil to the Will he bequeaths to him 5,000 rupees. *B* is entitled to receive 10,000 rupees.

(f) *A*, by one Codicil to his Will, bequeaths to *B* 5,000 rupees, and by another Codicil, bequeaths to him 6,000 rupees. *B* is entitled to receive 11,000 rupees.

(g) *A*, by his Will, bequeaths '500 rupees to *B* because she was his nurse,' and in another part of the Will bequeaths 500 rupees to *B* 'because she went to England with his children.' *B* is entitled to receive 1,000 rupees.

(h) *A*, by his Will, bequeaths to *B* the sum of 5,000 rupees, and also, in another part of the Will, an annuity of 400 rupees. *B* is entitled to both legacies.

(i) *A*, by his Will, bequeaths to *B* the sum of 5,000 rupees, and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. *B* is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees¹.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property. Constitution of residuary legatee.

Illustrations.

(a) *A* makes her Will, consisting of several testamentary papers, in one of which are contained the following words:—'I think there will be something left, after all funeral expenses, &c., to give to *B*, now at school, towards equipping him to any profession he may hereafter be appointed to.' *B* is constituted residuary legatee.

(b) *A* makes his Will, with the following passage at the end of it:—'I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire *B* to do, and keep the residue for her own use and pleasure.' *B* is constituted the residuary legatee.

(c) *A* bequeaths all his property to *B*, except certain stocks and funds, which he bequeaths to *C*. *B* is the residuary legatee¹.

90. Under a residuary bequest, the legatee is entitled to all property² belonging to the testator at the time of his death, of which he is entitled.

¹ *A*, by his 'last will,' appoints an executor, gives certain legacies, and proceeds thus: 'After these legacies and my funeral expenses are paid, I leave to my sister *B*.' *B* is constituted residuary legatee, *In re Bassett's estate*, L. R. 14 Eq. 54.

Sections 88 and 89 apply to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² whether moveable or immoveable, 22 Suth. 174.

which he has not made any other testamentary disposition which is capable of taking effect ¹.

Illustration.

A by his Will bequeaths certain legacies, one of which is void under the hundred and fifth Section and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his Will, A purchases a zamíndarí, which belongs to him at the time of his death. B is entitled to the two legacies and the zamíndarí as part of the residue.

Time of vesting of legacy in general terms.

91. If a legacy be given in general terms, without specifying the time when it is to be paid ², the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives ¹.

In what case a legacy lapses.

92. If the legatee ³ does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the Will that the testator intended that it should go to some other person ⁴. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator ⁵.

Illustrations.

(a) The testator bequeaths to B '500 rupees which B owes him.' B dies before the testator; the legacy lapses.

(b) A bequest is made to A and his children ⁶. A dies before the testator or happens to be dead when the Will is made. The legacy to A and his children lapses.

(c) A legacy is given to A, and in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(d) A sum of money is bequeathed to A for life, and after his

¹ whether by reason of lapse, remoteness, or otherwise. But see sec. 95, *infra*. Secs. 90 and 91 apply to Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² or delivered. The section applies to bequests of land and of every kind of moveable property. As to vesting where payment or delivery is postponed or the legacies are contingent, see Part xiii. *infra*.

³ whether of moveable or immove-

able property, and whether under a will or as appointee under a testamentary power.

⁴ A mere declaration that the gift shall not lapse is not enough.

⁵ This includes the donee of a testamentary power.

⁶ or to A and his executors or administrators, or to A and his heirs: see sec. 84, *supra*. In applying ill. (b) to Hindús, etc., 'children' includes adopted children, Act XXI of 1870, sec. 6.

death to *B*. *A* dies in the lifetime of the testator; *B* survives the testator. The bequest to *B* takes effect.

(e) A sum of money is bequeathed to *A* on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to *B*. *A* completes his eighteenth year, and dies in the lifetime of the testator. The legacy to *A* lapses, and the bequest to *B* does not take effect¹.

(f) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse².

93. If a legacy be given to two³ persons jointly, and one of them die⁴ before the testator, the other legatee takes the whole.

Where one of two joint legatees dies before testator.

Illustration.

The legacy is simply to *A* and *B*. *A* dies before the testator. *B* takes the legacy⁵.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect in such case of words showing intention that shares should be distinct.

Illustration.

A sum of money is bequeathed to *A*, *B*, and *C*, to be equally divided among them. *A* dies before the testator. *B* and *C* shall only take so much as they would have had if *A* had survived the testator⁶.

95. Where the share that lapses is a part of the general residue⁷ bequeathed by the Will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

¹ This shows that the doctrine of lapse applies to contingent bequests.

² Applies to Hindûs, etc., in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

³ The number 'two' is merely for example. A bequest to three or more persons *nominatim*, or to a class, without more, creates a joint tenancy, and if one of the legatees predecease the testator his interest will survive to the others. But the Courts favour tenancy in common; and even where

the bequest was upon trust to divide the same equally between certain children 'as joint tenants,' it was held that a tenancy in common was created.

⁴ If the legacy to one of the joint tenants fail from any cause other than death, the other joint tenant takes the whole. Thus if *A* gives a legacy to *B* and *C*, and by a codicil revokes his bequest to *B*, *C* takes the whole. So where *B* is an attesting witness.

⁵ i. e. all of which no effectual disposition is made otherwise than by the residuary clause.

Illustration.

The testator bequeaths the residue of his estate to *A*, *B*, and *C*, to be equally divided between them. *A* dies before the testator. His one-third of the residue goes as undisposed of ¹.

When a bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

96. Where a bequest ² shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator ³, but any lineal descendant of his ⁴ shall survive the testator, the bequest shall not lapse, but shall take effect ⁵ as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

Illustration.

A makes his Will, by which he bequeaths a sum of money to his son *B* for his own absolute use and benefit. *B* dies before *A*, leaving a son *C* who survives *A*, and having made his Will whereby he bequeaths all his property to his widow *D*. The money goes to *D* ⁶.

Bequest to *A* for *B*'s benefit where *A* dies in testator's lifetime.

97. Where a bequest is made to one person for the benefit ⁷ of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made ⁶.

Survivorship in case of bequest to a described class.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death ⁶.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior

¹ and be divided among all the next of kin, even though the testator directs that one of them shall not share, 4 Beav. 318. Sec. 95 applies to Hindus etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² This includes a testamentary appointment under a general power.

³ or is dead at the date of the will, 7 Hare, 473.

⁴ whether such descendant was or was not alive at the death of the legatee.

⁵ i.e. shall go to the legatee's representatives, not to the 'lineal descendant' whose existence prevents the lapse.

⁶ Sections 95, 96, 97 apply to Hindus etc., Act XXI of 1870; and in the illustration to sec. 95, 'son' would include 'adopted son.'

⁷ wholly or partially. If, e.g., *A* bequeaths to *B* property charged with a legacy to *C*, and *B* dies in *A*'s lifetime, *C* is still entitled to his legacy.

bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator¹.

Illustrations.

(a) *A* bequeaths 1,000 rupees to 'the children of *B*' without saying when it is to be distributed among them. *B* had died previous to the date of the Will, leaving three children², *C*, *D*, and *E*. *E* died after the date of the Will, but before the death of *A*. *C* and *D* survive *A*. The legacy shall belong to *C* and *D*, to the exclusion of the representatives of *E*.

(b) *A* bequeaths a legacy to the children of *B*. At the time of the testator's death, *B* has no children. The bequest is void³.

(c) A lease for years of a house was bequeathed to *A* for his life, and after his decease to the children of *B*. At the death of the testator, *B* had two children living, *C* and *D*; and he never had any other child. Afterwards, during the lifetime of *A*, *C* died, leaving *E* his executor. *D* has survived *A*. *D* and *E* are jointly entitled to so much of the leasehold term as remains unexpired.

(d) A sum of money was bequeathed to *A* for her life, and after her decease to the children of *B*. At the death of the testator, *B* had two children living, *C* and *D*, and after that event, two children, *E* and *F*, were born to *B*. *C* and *E* died in the lifetime of *A*, *C* having made a Will, *E* having made no Will. *A* has died, leaving *D* and *F* surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of *C*, one to *D*, one to the administrator of *E*, and one to *F*.

(e) *A* bequeaths one-third of his lands to *B* for his life, and after his decease to the sisters of *B*. At the death of the testator, *B* had two sisters living, *C* and *D*, and after that event another sister *E* was born. *C* died during the life of *B*; *D* and *E* have survived *B*. One-third of *A*'s lands belongs to *D*, *E*, and the representatives of *C*, in equal shares.

(f) *A* bequeaths 1,000 rupees to *B* for life, and after his death equally among the children of *C*. Up to the death of *B*, *C* had not had any child. The bequest after the death of *B* is void.

(g) *A* bequeaths 1,000 rupees to 'all the children born or to be born' of *B*, to be divided among them at the death of *C*. At the death of the testator, *B* has two children living, *D* and *E*. After the death of the testator, but in the lifetime of *C*, two other children, *F* and *G*, are born to *B*. After the death of *C*,

¹ This section seems to apply only to vested interests, 4 Cal. 313.

² This includes adopted children,

Act XXI of 1870, sec. 6.

³ It is otherwise in England.

another child is born to *B*. The legacy belongs to *D*, *E*, *F*, and *G*, to the exclusion of the after-born child of *B*.

(*h*) *A* bequeaths a fund to the children of *B*, to be divided among them when the eldest shall attain majority. At the testator's death, *B* had one child living, named *C*. He afterwards had two other children, named *D* and *E*. *E* died, but *C* and *D* were living when *C* attained majority. The fund belongs to *C*, *D* and the representatives of *E*, to the exclusion of any child who may be born to *B* after *C*'s attaining majority¹.

¹ 4 Cal. 673. This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay; and in the illustrations 'children' includes 'adopted children.'

PART XII.

OF VOID BEQUESTS.

99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Bequest to a person by a particular description, who does not exist at testator's death.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or if he be dead, to his representatives¹.

Illustrations.

(a) *A* bequeaths 1,000 rupees to the eldest son of *B*. At the death of the testator *B* has no son. The bequest is void.

(b) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son. Afterwards, during the life of *B*, a son is born to *C*. Upon *B*'s death, the legacy goes to *C*'s son².

(c) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son; afterwards, during the life of *B*, a son, named *D*, is born to *C*. *D* dies, then *B* dies. The legacy goes to the representative of *D*².

(d) *A* bequeaths his estate of Greenacre to *B* for life, and at his decease to the eldest son of *C*. Up to the death of *B*, *C* has had no son. The bequest to *C*'s eldest son is void².

(e) *A* bequeaths 1,000 rupees to the eldest son of *C*, to be paid to him after the death of *B*. At the death of the testator, *C* has no son, but a son is afterwards born to him during the life of

¹ This rule must be understood as subject to the restrictions in secs. 100 and 101, see per Wilson J., 9 C. L. R.

121.

² Here the gift is deferred 'by reason of a prior bequest.'

B and is alive at *B*'s death. *C*'s son is entitled to the 1,000 rupees¹.

Bequest to person not existing at testator's death, subject to prior bequest.

100. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations.

(a) Property is bequeathed to *A* for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, *A* has no son. Here the bequest to *A*'s eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to *A*'s eldest son for his life is void².

(b) A fund is bequeathed to *A* for his life, and after his death to his daughters. *A* survives the testator. *A* has daughters, some of whom were not in existence at the testator's death. The bequest to *A*'s daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to *A*'s daughters is valid.

(c) A fund is bequeathed to *A* for his life, and after his death to his daughters, with a direction that if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life, and may be divisible among her children after her death. *A* has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect, in the case of each daughter who marries under eighteen, of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(d) *A* bequeaths a sum of money to *B* for life, and directs that upon the death of *B* the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. *B* has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of *B* is contained in the direction to settle the fund, and this direction amounts to

¹ Here the gift is deferred 'otherwise.'

Sec. 99 applies to Hindus etc. in the Lower Provinces and in the towns of

Madras and Bombay, Act XXI of 1870. In the illustrations 'son' includes an adopted son, *ibid.* sec. 6.

² Here 'son' includes adopted son.

a bequest, to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of *B* is void¹.

101. No bequest is valid whereby the vesting of the thing bequeathed may² be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule
against
perpetui-
ties³.

Illustrations.

(a) A fund is bequeathed to *A* for his life; and after his death to *B* for his life; and after *B*'s death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B*, and the minority of the sons of *B*. The bequest after *B*'s death is void.

(b) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(c) A fund is bequeathed to *A* for his life, and after his death to *B* for his life; with a direction that after *B*'s death it shall be divided amongst such of *B*'s children as shall attain the age of 18; but that if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

¹ Sec. 100 applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870. But it contemplates a power of disposition extending further in time than Hindú law allows, as by that law some one in existence at the testator's own death must be the ultimate legatee, West and Bühler's Digest, 3rd ed. p. 224, citing the Tagore case, 9 Ben. 377, and 6 Bom. 38.

² In deciding questions of remoteness, it is an invariable principle of

the English Courts to pay regard to possible and not to actual events; and the fact that a gift *might* include objects too remote or incapable of profiting directly by the testator's bounty, is held to be fatal to its validity. This principle is equally applicable to the interpretation of the wills of Hindús, 2 Cal. 268-269, per Pontifex J.

³ This should be called the rule against remoteness.

(d) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid¹.

Bequest to class, of which some may come under rules in sections 100 and 101.

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void².

Illustrations.

(a) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void.

(b) A fund is bequeathed to A for his life, and after his death to B, C, D, and all other the children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in Illustration (a). The mention of B, C and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void³.

Bequest to take effect on failure of bequest void under sections 100, 101 or 102.

103. Where a bequest is void by reason of any of the rules contained in the three last preceding Sections, any bequest contained in the same Will, and intended to take effect after or upon failure of such prior bequest, is also void.

¹ This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, and here, as in sec. 102, 'son,' 'sons' and 'children' include an adopted child.

² 8 Ben. 410. This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay.

³ 4 Cal. 304. This section applies to Hindús etc. in the Lower Provinces

and in the towns of Madras and Bombay. As to illustration (b) see remarks of the Judicial Committee in L. R. 11 Ind. App. 177. It imports into India an English rule of construction which usually defeats the testator's intention, and it is out of place as attached to a section intended, not to define the word 'class,' but only to establish a special incident of gifts to classes.

Illustrations.

(a) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under Section 101. The bequest to *B* is void.

(b) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, and if no son of *A* shall attain that age, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect upon failure of the bequest to such of *A*'s sons as shall first attain the age of 25, which bequest is void under Section 101. The bequest to *B* is void¹.

104. A direction to accumulate the income arising from any property shall be void ; and the property shall be disposed of as if no accumulation had been directed.

Effect of
direction
for accu-
mulation.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death ; and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed².

Illustrations.

(a) The Will directs that the sum of 10,000 rupees shall be invested in Government securities, and the income accumulated for 20 years, and that the principal together with the accumulations shall then be divided between *A*, *B* and *C*. *A*, *B* and *C* are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.

(b) The Will directs that 10,000 rupees shall be invested, and the income accumulated until *A* shall marry, and shall then be paid to him. *A* is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(c) The Will directs that the rents of the farm of Sultánpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of *A*. At the death of the testator, *A* has an eldest son living, named *B*. *B* shall receive

¹ This section applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870. In the illustrations 'sons' includes adopted sons.

² This section is suggested by the Thellusson Act (39 & 40 Geo. III, c. 98), than which, however, it is much more stringent.

at the end of one year from the testator's death the rents which have accrued during the year, together with any interest which may have been made by investing them.

(d) The Will directs that the rents of the farm of Sultānpur shall be accumulated for ten years, and that the accumulations shall then be paid to the eldest son of A. At the death of the testator, A has no son. The bequest is void.

(e) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the Will, but in consequence of B's minority¹.

Bequest to religious or charitable uses.

105. No man² having a nephew or niece or any nearer relative³ shall have power to bequeath any property to religious or charitable⁴ uses, except by a Will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons⁵.

Illustration.

A having a nephew makes a bequest by a Will not executed nor deposited as required—

- For the relief of poor people;
- For the maintenance of sick soldiers;
- For the erection or support of a hospital;
- For the education and preferment of orphans;
- For the support of scholars;
- For the erection or support of a school;
- For the building and repairs of a bridge;
- For the making of roads;
- For the erection or support of a church;
- For the repairs of a church;
- For the benefit of ministers of religion;
- For the formation or support of a public garden.

All these bequests are void¹.

¹ This section does not apply to Hindús etc. in the Lower Provinces or in the towns of Madras and Bombay, Act XXI of 1870. See 8 Moo. I. A. 66.

² This includes woman, sec. 3, cl. 1.
³ Father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister; see sec. 24, supra.

⁴ i.e. for the benefit of the public, or some section thereof. See 1 Knapp, 245; 2 Moo. I. A. 390.

There is no prohibition in India of what English lawyers call 'superstitious uses'; see 2 Hyde, 65, and 2 Ben. O. C. 148 (in each of which cases bequests for the performance of masses were upheld): 5 Ben. 433, 440. See also 1 Knapp, 245; 14 Moo. I. A. 389.

⁵ As to the cy-près doctrine, which applies where there is a gift to trustees for charitable purposes, which cannot be accomplished at all, or not in the way prescribed, see 1 Mad. H. C. 429.

PART XIII.

OF THE VESTING OF LEGACIES¹.

106. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the Will², become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(a) *A* bequeaths to *B* 100 rupees, to be paid to him at the death of *C*. On *A*'s death the legacy becomes vested in interest in *B*, and if he dies before *C*, his representatives are entitled to the legacy.

(b) *A* bequeaths to *B* 100 rupees, to be paid to him upon his attaining the age of 18. On *A*'s death the legacy becomes vested in interest in *B*.

(c) A fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy to *B* becomes vested in interest in *B*.

¹ The whole of this Part applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

² As, e. g. if the testator direct that

the legacy shall vest in interest at a particular time, or that the legatee shall take if he attain a specified age, but not otherwise.

(d) A fund is bequeathed to *A* until *B* attains the age of 18, and then to *B*. The legacy to *B* is vested in interest from the testator's death.

(e) *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income, and then to make over the fund to *C*. At *A*'s death the gift to *C* becomes vested in interest in him.

(f) A fund is bequeathed to *A*, *B*, and *C* in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vest in interest in *A*, *B* and *C*, subject to be devested in case *A*, *B* and *C* shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18 his vested interest passes, so subject, to his representatives.

Date of vesting when legacy is contingent upon a specified uncertain event.

107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens. A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible. In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the Will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit; the bequest of the fund is not contingent.

Illustrations.

(a) A legacy is bequeathed to *D* in case *A*, *B* and *C* shall all die under the age of 18. *D* has a contingent interest in the legacy until *A*, *B* and *C* all die under 18, or one of them attains that age.

(b) A sum of money is bequeathed to *A* 'in case he shall attain the age of 18,' or, 'when he shall attain the age of 18.' *A*'s interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age.

(c) An estate is bequeathed to *A* for life, and after his death to *B*, if *B* shall then be living, but if *B* shall not be then living, to *C*. *A*, *B* and *C* survive the testator. *B* and *C* each take a contingent interest in the estate until the event which is to vest it in one or in the other shall have happened.

(d) An estate is bequeathed as in the case last supposed. *B* dies in the lifetime of *A* and *C*. Upon the death of *B*,

C acquires a vested right to obtain possession of the estate upon *A*'s death.

(e) A legacy is bequeathed to *A* when she shall attain the age of 18, or shall marry under that age with the consent of *B*, with a proviso that if she shall not attain 18, or marry under that age with *B*'s consent, the legacy shall go to *C*. *A* and *C* each take a contingent interest in the legacy. *A* attains the age of 18. *A* becomes absolutely entitled to the legacy, although she may have married under 18 without the consent of *B*.

(f) An estate is bequeathed to *A* until he shall marry, and after that event to *B*. *B*'s interest in the bequest is contingent until the condition shall be fulfilled by *A*'s marrying.

(g) An estate is bequeathed to *A* until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to *B*. *B*'s interest in the bequest is contingent until *A* takes advantage of the Act.

(h) An estate is bequeathed to *A* if he shall pay 500 rupees to *B*. *A*'s interest in the bequest is contingent until he has paid 500 rupees to *B*.

(i) *A* leaves his farm of Sultánpur Khurd to *B*, if *B* shall convey his own farm of Sultánpur Buzurg to *C*. *B*'s interest in the bequest is contingent until he has conveyed the latter farm to *C*.

(j) A fund is bequeathed to *A* if *B* shall not marry *C* within five years after the testator's death. *A*'s interest in the legacy is contingent, until the condition shall be fulfilled by the expiration of the five years without *B*'s having married *C*, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible.

(k) A fund is bequeathed to *A* if *B* shall not make any provision for him by Will. The legacy is contingent until *B*'s death.

(l) *A* bequeaths to *B* 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested¹.

(m) *A* bequeaths to *B* 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

108. Where a bequest is made only to such members of a class as shall have attained² a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Bequest to such members of a class as attain a particular age.

¹ Here, as interest is given, the testator must have meant an immediate gift, as the sum required to produce the annuity of Rs. 500 must, for the purpose of interest, be

immediately separated from the bulk of the property, *Vawdry v. Geddes*, 1 R. & M. 208.

² 'shall have attained' should be (as in the illustration) 'shall attain.'

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

PART XIV.

OF ONEROUS REQUESTS¹.

109. Where a bequest imposes an obligation² on the legatee, he can take nothing by it unless he accepts it fully. Onerous bequest.

Illustration.

A having shares in (X) a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X).

110. Where a Will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous. One of two separate and independent bequests to same person may be accepted, and the other refused.

Illustration.

A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He shall not by this refusal forfeit the money³.

¹ This Part applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

² i. e. the relation that exists between two persons of whom one has a private and peculiar right to control the other's actions by calling on him to do or forbear some particular thing, Pollock, *Principles of Contract*, p. 3, citing Savigny, Syst. i. 338-9; Obl. i. 4, seq. Sir W. Anson (*Law of*

Contract, p. 5), also citing Savigny, defines Obligation as a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group.

³ The section and its illustration seem directly contrary to Sir John Leach's decision in *Talbot v. Lord Radnor*, 3 M. & K. 254. But see *Warren v. Rudall*, 1 Johns. & H. 1, and *Long v. Kent*, 11 Jur. N. S. 724.

PART XV.

OF CONTINGENT BEQUESTS¹.

Bequest contingent upon a specified uncertain event, no time being mentioned for its occurrence.

111. Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations.

(a) A legacy is bequeathed to *A*, and in case of his death², to *B*. If *A* survives the testator, the legacy to *B* does not take effect.

(b) A legacy is bequeathed to *A*, and in case of his death without children, to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect.

(c) A legacy is bequeathed to *A* when and if he attains the age of 18, and in case of his death, to *B*. *A* attains the age of 18. The legacy to *B* does not take effect.

(d) A legacy is bequeathed to *A* for life, and after his death to *B*, and, 'in case of *B*'s death without children,' to *C*. The words 'in case of *B*'s death without children' are to be understood as meaning in case *B* shall die without children during the lifetime of *A*.

(e) A legacy is bequeathed to *A* for life, and after his death to *B*, and 'in case of *B*'s death,' to *C*. The words 'in case of *B*'s death' are to be considered as meaning 'in case *B* shall die in the lifetime of *A*.'

Bequest to such of certain persons as shall be surviving at some period not specified.

112. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the Will³.

¹ This Part applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

² or 'in the event of his death,'

or 'if he die.'

³ Survivorship *prima facie* refers to the point of time mentioned in the gift in nearest juxtaposition with the words; Hawkins, 260.

Illustrations.

(a) Property is bequeathed to *A* and *B*, to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*¹.

(b) Property is bequeathed to *A* for life, and after his death to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the life of *A*; *C* survives *A*. At *A*'s death the legacy goes to *C*.

(c) Property is bequeathed to *A* for life, and after his death to *B* and *C*, or the survivor, with a direction that if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; *B* survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(d) Property is bequeathed to *A* for life, and after his death to *B* and *C*, with a direction that in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards *C* dies in the lifetime of *A*. The legacy goes to the representative of *C*².

¹ Here the testator's death is the time of distribution. the last antecedent, i. e. the death of the legatee dying first.

² Here the survivorship refers to

PART XVI.

OF CONDITIONAL BEQUESTS¹.

Bequest
upon im-
possible
condition.

113. A bequest upon an impossible² condition is void.

Illustrations.

(a) An estate is bequeathed to *A* on condition that he shall walk one hundred miles in an hour. The bequest is void.

(b) *A* bequeaths 500 rupees to *B* on condition that he shall marry *A*'s daughter. *A*'s daughter was dead at the date of the Will. The bequest is void.

Bequest
upon illegal
or immoral
condition.

114. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality³, is void.

Illustrations.

(a) *A* bequeaths 500 rupees to *B* on condition that he shall murder *C*. The bequest is void.

(b) *A* bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

Fulfilment
of condition
precedent
to vesting
of legacy.

115. Where a Will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C*, *D* and *E*. *A* marries with the written consent of *B*. *C* is present at the marriage. *D* sends a present to *A* previous to the marriage. *E* has been personally informed by *A* of his intentions, and has made no objection. *A* has fulfilled the condition⁴.

¹ This Part applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

² physically or legally, as, e.g. if *A* bequeath property to a married woman *B* on condition that she transfer other property bequeathed to her

by *C* to her separate use with a clause against anticipation, *A*'s bequest is void, *Robinson v. Wheelright*, 6 D. M. G. 535.

³ As to the kind of morality here referred to, see *supra*, p. 232, note 3.

⁴ *Qui tacet satis loquitur*.

(b) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *D* dies. *A* marries with the consent of *B* and *C*. *A* has fulfilled the condition.

(c) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries in the lifetime of *B*, *C* and *D*, with the consent of *B* and *C* only. *A* has not fulfilled the condition.

(d) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* obtains the unconditional assent of *B*, *C* and *D* to his marriage with *E*. Afterwards *B*, *C* and *D* capriciously retract their consent. *A* marries *E*. *A* has fulfilled the condition.

(e) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries without the consent of *B*, *C* and *D*, but obtains their consent after the marriage. *A* has not fulfilled the condition.

(f) *A* makes his Will, whereby he bequeaths a sum of money to *B* if *B* shall marry with the consent of *A*'s executors. *B* marries during the lifetime of *A*, and *A* afterwards expresses his approbation of the marriage. *A* dies. The bequest to *B* takes effect.

(g) A legacy is bequeathed to *A* if he executes a certain document within a time specified in the Will. The document is executed by *A* within a reasonable time, but not within the time specified in the Will. *A* has not performed the condition, and is not entitled to receive the legacy.

116. Where there is a bequest to one person and a bequest of the same thing to another if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Bequest to *A* and, on failure of prior bequest, to *B*.

Illustrations.

(a) *A* bequeaths a sum of money to his own children surviving him, and if they all die under 18, to *B*. *A* dies without having ever had a child. The bequest to *B* takes effect.

(b) *A* bequeaths a sum of money to *B*, on condition that he shall execute a certain document within three months after *A*'s death, and if he should neglect to do so, to *C*. *B* dies in the testator's lifetime. The bequest to *C* takes effect.

117. Where the Will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

Second bequest intended to take effect only where first fails in particular manner.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to *B* that which he had bequeathed to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to *B* does not take effect¹.

Bequest over, conditional upon the happening or not happening of a specified uncertain event.

118. A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or, that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person. In each case the ulterior bequest is subject to the rules contained in Sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117.

Illustrations.

(a) A sum of money is bequeathed to *A*, to be paid to him at the age of 18, and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* shall die under 18.

(b) An estate is bequeathed to *A* with a proviso that if *A* shall dispute the competency of the testator to make a Will, the estate shall go to *B*. *A* disputes the competency of the testator to make a Will. The estate goes to *B*.

(c) A sum of money is bequeathed to *A* for life, and after his death to *B*, but if *B* shall then be dead, leaving a son, such son is to stand in the place of *B*. *B* takes a vested interest in the legacy, subject to be divested if he dies leaving a son in *A*'s lifetime.

(d) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representative of *A* takes one-half of the money, and the representative of *B* takes the other half.

(e) *A* bequeaths to *B* the interest of a fund for life, and directs the fund to be divided, at her death, equally among her three children, or such of them as shall be living at her death. All the children of *B* die in *B*'s lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

Condition must be

119. An ulterior bequest of the kind contemplated by the

¹ Here the gift over was made dependent on an event (*A*'s surviving his wife) which was not proved to have happened; and it did not become operative from the mere fact of

the gift to wife failing to have practical operation, for *A* indicated no such intention either expressly or impliedly, *Underwood v. Wing*, 4 D. M. G. 633.

last preceding Section cannot take effect, unless the condition strictly fulfilled.¹

Illustrations.

(a) A legacy is bequeathed to *A*, with a proviso that if he marries without the consent of *B*, *C* and *D*, the legacy shall go to *E*. *D* dies. Even if *A* marries without the consent of *B* and *C*, the gift to *E* does not take effect.

(b) A legacy is bequeathed to *A*, with a proviso that if he marries without the consent of *B*, the legacy shall go to *C*. *A* marries with the consent of *B*. He afterwards becomes a widower and marries again without the consent of *B*. The bequest to *C* does not take effect.

(c) A legacy is bequeathed to *A*, to be paid at 18, or marriage, with a proviso that if *A* dies under 18, or marries without the consent of *B*, the legacy shall go to *C*. *A* marries under 18, without the consent of *B*. The bequest to *C* takes effect.

120. If the ulterior bequest be not valid, the original bequest is not affected by it.

Original bequest not affected by invalidity of second.

Illustrations.

(a) An estate is bequeathed to *A* for his life, with a condition superadded that if he shall not on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void, *A* retains his estate as if no condition had been inserted in the Will.²

(b) An estate is bequeathed to *A* for her life, and if she do not desert her husband, to *B*. *A* is entitled to the estate during her life as if no condition had been inserted in the Will.³

(c) An estate is bequeathed to *A* for life, and, if he marries, to the eldest son of *B* for life. *B*, at the date of the testator's death, had not had a son. The bequest over is void under Section 92, and *A* is entitled to the estate during his life.⁴

121. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Bequest conditioned to cease to have effect if specified uncertain event shall happen or not happen.

Illustrations.

(a) An estate is bequeathed to *A* for his life, with a proviso

¹ Conditions subsequent are construed with great strictness, as they go to divest estates already vested.

² Here the condition subsequent is impossible.

³ Here it is void, as being *contra bonos mores*.

⁴ Here the gift over is void, by reason of being too remote.

So if the condition subsequent be too vague for the Court to enforce it, *Fillingham v. Bromley*, T. & R. 530, where the words were 'live and reside on' a certain estate.

that in case he shall cut down a certain wood, the bequest shall cease to have any effect. *A* cuts down the wood; he loses his life-interest in the estate.

(b) An estate is bequeathed to *A*, provided that if he marries under the age of 25 without the consent of the executors named in the Will, the estate shall cease to belong to him. *A* marries under 25 without the consent of the executors. The estate ceases to belong to him.

(c) An estate is bequeathed to *A*, provided that if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. *A* does not go to England within the time prescribed. His interest in the estate ceases.

(d) An estate is bequeathed to *A*, with a proviso that if she becomes a nun she shall cease to have any interest in the estate. *A* becomes a nun. She loses her interest under the Will.

(e) A fund is bequeathed to *A* for life, and after his death to *B*, if *B* shall be then living, with a proviso that if *B* shall become a nun, the bequest to her shall cease to have any effect. *B* becomes a nun in the lifetime of *A*. She thereby loses her contingent interest in the fund.

Such condition must not be invalid under sec. 107.

122. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by the one hundred and seventh section.

Legatee rendering impossible act for which no time specified and on nonperformance of which subject-matter is to go over.

123. Where a bequest is made with a condition superadded that unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect; but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(a) A bequest is made to *A* with a proviso that unless he enters the army the legacy shall go over to *B*. *A* takes holy orders, and thereby renders it impossible that he should fulfil the condition. *B* is entitled to receive the legacy.

(b) A bequest is made to *A* with a proviso that it shall cease to have any effect if he does not marry *B*'s daughter. *A* marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

124. Where the Will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect; the act must be performed within the time specified, unless the performance of it be prevented by fraud¹, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud².

Performance of condition within specified time.

Time allowed in case of fraud.

¹ As to the meaning of 'fraud,' see above, p. 98.

² In the case of a condition precedent, when the act is required to be performed within a specified time

after the testator's decease, the computation of the term will be exclusive of the day of his death, *Lester v. Garland*, 15 Ves. 248.

PART XVII.

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT¹.

Direction that funds be employed in particular manner following absolute bequest of same to or for benefit of any person.

125. Where a fund is bequeathed absolutely to or for the benefit of any person, but the Will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the Will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to purchase a commission in the Army for A², or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so³.

Direction that mode of enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee.

126. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the Will had contained no such direction.

Illustrations.

(a) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life, and be paid to their children after their death. All the daughters die un-

¹ This Part applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870. Where a Hindú bequeathed his land to his sons, but declared that they should not make a partition thereof for twenty years, the restriction was held void as being repugnant to the gift, 1 Cal. 104.

² Such purchases are now impossible, see *Palmer v. Flower*, L. R. 13 Eq. 250.

³ even though the testator has expressly declared that A shall not be permitted to receive it, *Stokes v. Cheek*, 29 L. J. Ch. 922. The legatee ought not to be compelled by a Court to do what he may undo the next moment, as by selling the residence, giving up the business, etc.

If A die before receiving the money, his representatives are entitled thereto, *Bayne v. Crowther*, 20 Beav. 400.

married, the representatives of each daughter are entitled to her share of the residue.

(b) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund, and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund¹.

127. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the Will, remains a part of the estate of the testator.

Bequest of fund for certain purposes, some of which cannot be fulfilled.

Illustrations.

(a) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children; the son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(b) A bequeaths the residue of his estate to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

¹ This and the following section express Lord Cottenham's ruling in *Lassence v. Tierney*, 1 Mac. & G. 551, and see *Kellett v. Kellett*, L. R. 1 E & I, App. 161.

PART XVIII.

OF REQUESTS TO AN EXECUTOR¹.

Legatee
named as
executor
cannot take
unless he
shows in-
tention to
act as
executor.

128. If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy unless he proves the Will or otherwise manifests an intention to act as executor².

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the Will, and dies a few days after the testator, without having proved the Will. A has manifested an intention to act as executor.

¹ This Part applies to Hindús etc. in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870. It extends to every kind of bequest, specific, demonstrative, or residuary.

² This is the old rule in England (*Cockerell v. Barber*, 2 Russ. 599), except in the case of a residuary bequest, Wms. Exors. 1287. The Act does not say that if the executor proves he *shall* have his legacy, but

that he shall not have it if he does not prove. It will make no difference that the executor is aged and incapable by bodily and mental infirmities of proving the will. If an executor prove without a *bona fide* intention to execute the trusts, but merely to entitle himself technically to his legacy, he would not be allowed to take it (*Harford v. Browning*, 1 Cox, 302).

PART XIX.

OF SPECIFIC LEGACIES ¹.

129. Where a testator bequeaths to any person a specified ^{Specific} part of his property, which is distinguished from all other ^{legacy} parts of his property, the legacy is said to be specific. ^{defined.}

Illustrations.

(a) *A* bequeaths to *B*—

- 'The diamond ring presented to him by *C*.'
- 'His gold chain.'
- 'A certain bale of wool.'
- 'A certain piece of cloth.'
- 'All his household goods, which shall be in or about his dwelling-house in *M* Street, in Calcutta, at the time of his death.'
- 'The sum of 1,000 rupees in a certain chest.'
- 'The debt which *B* owes him.'
- 'All his bills, bonds, and securities belonging to him, lying in his lodgings in Calcutta.'
- 'All his furniture in his house in Calcutta.'
- 'All his goods on board a certain ship then lying in the River Hooghly.'
- '2,000 rupees which he has in the hands of *C*.'
- 'The money due to him on the bond of *D*.'
- 'His mortgage on the Rampore Factory.'
- 'One-half of the money owing to him on his mortgage of Rampore Factory.'
- '1,000 rupees, being part of a debt due to him from *C*.'
- 'His capital Stock of 1,000*l.* in East India Stock.'
- 'His promissory notes of the Government of India, for 10,000 rupees in their 4 per cent. loan.'
- 'All such sums of money as his executors may, after his death, receive in respect of the debt due to him from the insolvent firm of *D* and Company.'
- 'All the wine which he may have in his cellar at the time of his death.'
- 'Such of his horses as *B* may select.'
- 'All his shares in the Bank of Bengal.'

¹ This Part applies to Hindús etc. of Madras and Bombay, Act XXI of 1870.
in the Lower Provinces and the towns

'All the shares in the Bank of Bengal which he may possess at the time of his death.'

'All the money which he has in the $5\frac{1}{2}$ per cent. loan of the Government of India.'

'All the Government securities he shall be entitled to at the time of his decease.'

Each of these legacies is specific.

(b) *A* having Government promissory notes for 10,000 rupees, bequeaths to his executors 'Government promissory notes for 10,000 rupees in trust to sell' for the benefit of *B*.

The legacy is specific.

(c) *A* having property at Benares, and also in other places, bequeaths to *B* all his property at Benares.

The legacy is specific.

(d) *A* bequeaths to *B*—

His house in Calcutta.

His zamindari of Rampore.

His taluk of Ramnagar.

His lease of the Indigo factory of Sulkea.

An annuity of 500 rupees out of the rents of his zamindari of *W*.

A directs his zamindari of *X* to be sold and the proceeds to be invested for the benefit of *B*.

Each of these bequests is specific¹.

(e) *A* by his Will charges his zamindari of *Y* with an annuity of 1,000 rupees to *C* during his life, and subject to this charge he bequeaths the zamindari to *D*.

Each of these bequests is specific.

(f) *A* bequeaths a sum of money to buy a house in Calcutta for *B*.

To buy an estate in Zillah Fureedpore for *B*.

To buy a diamond ring for *B*.

To buy a horse for *B*.

To be invested in shares in the Bank of Bengal for *B*.

To be invested in Government securities for *B*.

A bequeaths to *B*—

'A diamond ring.'

'A horse.'

'10,000 rupees worth of Government securities.'

'An annuity of 500 rupees.'

'2,000 rupees, to be paid in cash.'

'So much money as will produce 5,000 rupees 4 per cent. Government securities.'

These bequests are not specific².

(g) *A*, having property in England and property in India, bequeaths a legacy to *B*, and directs that it shall be paid out of

¹ Every bequest of immoveable property is specific.

² They are general.

the property which he may leave in India. He also bequeaths a legacy to *C*, and directs that it shall be paid out of the property which he may leave in England.

No one of these legacies is specific¹.

130. Where a sum certain is bequeathed, the legacy is not specific merely because the stocks, funds, or securities in which it is invested are described in the Will.

Illustration.

A bequeaths to *B*—

‘10,000 rupees of his funded property.’

‘10,000 rupees of his property now invested in Shares of the East Indian Railway Company.’

‘10,000 rupees, at present secured by mortgage of Rampore Factory.’

No one of these legacies is specific.

Bequest of sum certain where stocks, &c. in which it is invested are described.

131. Where a bequest is made in general terms, of a certain amount of any kind of stock, the legacy is not specific merely because the testator was at the date of his Will possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustration.

A bequeaths to *B* 5,000 rupees five per cent. Government securities. *A* had at the date of the Will five per cent. Government securities for 5,000 rupees².

The legacy is not specific.

132. A money legacy is not specific merely because the Will directs its payment to be postponed until some part of the property of the testator shall have been reduced to a certain form, or remitted to a certain place³.

Illustration.

A bequeaths to *B* 10,000 rupees, and directs that this legacy shall be paid as soon as *A*'s property in India shall be realized in England.

The legacy is not specific.

Bequest of money not to be paid until some part of testator's property has been disposed of in certain way.

¹ They are demonstrative.

² The illustration assumes that there is nothing in the will to show that *A* intended *B* to take the identical securities.

³ The distinction between specific and general legacies is important; for, as we see from sec. 136, if there be a deficiency of assets, a specific legacy will not be liable to abate with

the general legacies. Moreover, if it be to a person in being, and of an object producing income, it carries the income from the testator's death (sec. 309). On the other hand, if the specific legacy fail by the ademption or inadequacy of its object, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate.

When enumerated articles not to be deemed specifically bequeathed.

Retention, in form, of specific bequest to several persons in succession.

133. Where a Will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

134. Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Illustrations.

(a) *A* having a lease of a house for a term of years, 15 of which were unexpired at the time of his death, has bequeathed the lease to *B* for his life, and after *B*'s death to *C*. *B* is to enjoy the property as *A* left it, although if *B* lives for 15 years, *C* can take nothing under the bequest.

(b) *A* having an annuity during the life of *B*, bequeaths it to *C* for his life, and after *C*'s death, to *D*. *C* is to enjoy the annuity as *A* left it, although, if *B* dies before *D*, *D* can take nothing under the bequest.

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

135. Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall in the absence of any direction to the contrary be sold, and the proceeds of the sale shall be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the Will.

Illustration.

A, having a lease for a term of years, bequeaths 'all his property' to *B* for life, and after *B*'s death, to *C*. The lease must be sold, and the proceeds invested as stated in the text, and the annual income arising from the fund is to be paid to *B* for life. At *B*'s death the capital of the fund is to be paid to *C*.

Where deficiency of assets to pay legacies, specific legacy not liable to abate with general legacies.

136. If there be a deficiency of assets to pay legacies¹, a specific legacy is not liable to abate with the general legacies.

¹ But when the assets not specifically bequeathed are insufficient to pay all the debts and necessary expenses, then the specific legacies abate

in proportion to their respective values. This should have been expressly provided. It seems assumed in sec. 288.

PART XX.

OF DEMONSTRATIVE LEGACIES¹.

137. Where a testator bequeaths a certain sum of money or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative².

Illustrations.

(a) *A* bequeaths to *B* 1,000 rupees, being part of a debt due to him from *W*³. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. The legacy to *B* is specific; the legacy to *C* is demonstrative.

(b) *A* bequeaths to *B* 'ten bushels of the corn which shall grow in his field of Greenacre.'

'80 chests of the Indigo which shall be made at his factory of Rampore.'

'10,000 rupees out of his five per cent. promissory notes of the Government of India.'

An annuity of 500 rupees 'from his funded property.'

'1,000 rupees out of the sum of 2,000 rupees due to him by *C*.'

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² A demonstrative legacy is so far general that if the fund be called in or fail the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; but it is so far specific, that it will not be liable to abate with general legacies upon a deficiency of assets (Wms.

Exors. 1043). It is, however, liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable.

A demonstrative legacy does not carry interest or income from the testator's death, *Mullins v. Smith*, 1 Dr. & Sm. 204, 210. Otherwise in the case of a specific legacy, *infra*, sec. 309.

³ See above, sec. 109, *ill.* (a), No. 15.

A bequeaths to *B* an annuity, and directs it to be paid out of the rents arising from his taluk of Rámnagar.

A bequeaths to *B* '10,000 rupees out of his estate at Rámnagar,' or charges it on his estate at Rámnagar.

'10,000 rupees, being his share of the capital embarked in a certain business.'

Each of these bequests is demonstrative.

Order of
payment
when
legacy
directed to
be paid out
of fund
of which
part is spe-
cifically be-
queathed.

138. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

A bequeaths to *B* 1,000 rupees, being part of a debt due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. The debt due to *A* from *W* is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to *B*, and 500 rupees are to be paid to *C*. *C* is also to receive 500 rupees out of the general assets of the testator.

PART XXI.

OF ADEMPION OF LEGACIES¹.

139. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the Will².

Illustrations.

(a) *A* bequeaths to *B*—

‘The diamond ring presented to him by *C*.’

‘His gold chain.’

‘A certain bale of wool.’

‘A certain piece of cloth.’

‘All his household goods which shall be in or about his dwelling-house in *M* Street, in Calcutta, at the time of his death.’

A, in his lifetime,

Sells or gives away the ring.

Converts the chain into a cup.

Converts the wool into cloth.

Makes the cloth into a garment.

Takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(b) *A* bequeaths to *B*—

‘The sum of 1,000 rupees in a certain chest.’

‘All the horses in his stable.’

At the death of *A*, no money is found in the chest, and no horses in the stable.

The legacies are adeemed.

(c) *A* bequeaths to *B* certain bales of goods. *A* takes the goods

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² Where the disposition of the object is not absolute, the legacy is not adeemed, as where a testator pawns an article which he has specifically

bequeathed; a right of redemption is left in him and passes at his death to the legatee (see sec. 154, ill. a.)

Where a legacy has been adeemed and the testator then confirms his will by a codicil, this does revive the legacy.

with him on a voyage. The ship and goods are lost at sea, and *A* is drowned.

The legacy is adeemed.

Non-
ademption
of demon-
strative
legacy.

140. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the Will does not exist at the time of the death of the testator, or has been converted into property of a different kind; but it shall in such case be paid out of the general assets of the testator.

Ademption
of specific
bequest of
right to
receive
something
from a
third party.

141. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations.

(a) *A* bequeaths to *B*—

‘The debt which *C* owes him.’

‘2,000 rupees which he has in the hands of *D*.’

‘The money due to him on the bond of *E*.’

‘His mortgage on the Rampore Factory.’

All these debts are extinguished in *A*’s lifetime, some with and some without his consent.

All the legacies are adeemed.

(b) *A* bequeaths to *B*—

‘His interest in certain policies of life assurance.’

A in his lifetime receives the amount of the policies.

The legacy is adeemed.

Ademption
pro tanto
by testa-
tor’s receipt
of part of
thing speci-
fically be-
queathed.

142. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

Illustration.

A bequeaths to *B* ‘the debt due to him by *C*.’ The debt amounts to 10,000 rupees. *C* pays to *A* 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by *A*¹.

Ademption
pro tanto
by testa-
tor’s re-
ceipt of
portion of

143. If a portion of an entire fund or stock be specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund

¹ So where *A* bequeaths to *B* a debt owing to *A* by *C*, and *C* becomes insolvent and *A* receives a dividend in respect of his debt, this is only an

ademption *pro tanto*, and *B* is entitled to receive such further dividends as may be payable.

or stock shall be applicable to the discharge of the specific legacy.

Illustration.

A bequeaths to *B* one-half of the sum of 10,000 rupees due to him from *W*. *A* in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from *W* to *A* at the time of his death belong to *B* under the specific bequest.

fund of which portion has been specifically bequeathed.

144. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee; if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and testator having received portion of that fund, remainder is insufficient to pay both legacies.

Illustration.

A bequeaths to *B* 1,000 rupees, part of the debt of 2,000 rupees due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. *A* afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from *W*. Of these 1,500 rupees, 1,000 rupees belong to *B*, and 500 rupees are to be paid to *C*. *C* is also to receive 500 rupees out of the general assets of the testator.

145. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed¹.

Ademption where stock, specifically bequeathed, does not exist at testator's death.

Illustration.

A bequeaths to *B*—

‘His capital stock of 1,000*l.* in East India Stock.’

‘His promissory notes of the Government of India for 10,000 rupees in their four per cent. loan.’

A sells the stock and the notes.

The legacies are adeemed.

¹ But see secs. 150-152, which show that there is no ademption (a) where the stock specifically bequeathed is exchanged by act of law, (b) where the change is made without the testator's knowledge or sanction, (c) where

he lends the stock on condition of its being re-placed; and sec. 153, which shows that the ademption is not irrevocable, and that the legacy would be revived by a new purchase of similar stock by the testator.

Ademption
pro tanto
where
stock, specifically be-
queathed,
exists in
part only at
testator's
death.

146. Where stock which has been specifically bequeathed does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to *B*—

'His 10,000 rupees in the 5½ per cent. loan of the Government of India.'

A sells one-half of his 10,000 rupees in the loan in question.

One-half of the legacy is adeemed.

Specific
bequest of
goods de-
scribed as
connected
with cer-
tain place
not
adeemed
by removal.

147. A specific bequest of goods under a description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause¹, or by fraud, or without the knowledge or sanction of the testator.

Illustrations.

A bequeaths to *B* 'all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death.' The goods are removed from the house to save them from fire. *A* dies before they are brought back.

A bequeaths to *B* 'all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death.' During *A*'s absence upon a journey, the whole of the goods are removed from the house. *A* dies without having sanctioned their removal.

Neither of these legacies is adeemed.

When
removal of
thing be-
queathed
does not
constitute
ademption.

148. The removal of the thing bequeathed from the place in which it is stated in the Will to be situated does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

A bequeaths to *B* all the bills, bonds, and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death, these effects had been removed from his lodgings in Calcutta.

A bequeaths to *B* all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture

¹ As, for instance, for repairs, safe custody, or preservation from fire.

only, which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

A bequeaths to *B* all his goods on board a certain ship then lying in the River Hooghly. The goods are removed by *A*'s directions to a warehouse, in which they remain at the time of *A*'s death.

No one of these legacies is revoked by ademption.

149. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which shall be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed¹.

When thing bequeathed is to be received by testator from third person; and testator himself receives it.

Illustration.

A bequeaths to *B* whatever sum may be received from his claim on *C*. *A* receives the whole of his claim on *C*, and sets it apart from the general mass of his property.

The legacy is not adeemed.

150. Where a thing specifically bequeathed undergoes a change between the date of the Will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Change by operation of law of subject of specific bequest between date of Will and testator's death.

Illustrations.

A bequeaths to *B* 'all the money which he has in the 5½ per cent. loan of the Government of India.'

The securities for the 5½ per cent. loan are converted during *A*'s lifetime into five per cent. stock.

A bequeaths to *B* the sum of 2,000*l.*, invested in Consols in the names of trustees for *A*.

The sum of 2,000*l.* is transferred by the trustees into *A*'s own name.

A bequeaths to *B* the sum of 10,000 rupees in promissory notes of the Government of India which he has power, under his marriage settlement, to dispose of by will. Afterwards, in *A*'s lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed².

¹ But see *Harrison v. Jackson*, L. R. 7 Ch. D. 339, per Jessel M.R.

² All cases of ademption arise from a supposed alteration of the testator's

intention, and in the cases put, the conversion or transfer is not sufficient evidence of such alteration.

Change of
subject
without
testator's
knowledge.

151. Where a thing specifically bequeathed undergoes a change between the date of the Will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to *B* 'all his 3 per cent. Consols.' The Consols are, without *A*'s knowledge, sold by his agent, and the proceeds converted into East India Stock.

This legacy is not adeemed¹.

Stock specifically bequeathed, lent, and replaced.

152. Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed².

Stock specifically bequeathed, sold but replaced and belonging to testator at his death.

153. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed³.

¹ 8 Sim. 171. So if stock standing in the name of a trustee and specifically bequeathed is, without the testator's knowledge or authority, sold or transferred into another fund.

² 1 Rep. Leg. 3rd ed. 291. The testator continues to be the owner of the stock.

³ In England this seems doubtful, Wms. Exors. 1330, 1331.

PART XXII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST¹.

154. Where property² specifically bequeathed is subject at the death of the testator to any pledge, lien, or incumbrance, created by the testator himself or by any person under whom he claims³; then, unless a contrary intention appears by the Will⁴, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance. A contrary intention shall not be inferred from any direction which the Will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section⁵.

Illustrations.

(a) *A* bequeaths to *B* the diamond ring given him by *C*. At *A*'s death the ring is held in pawn by *D*, to whom it has been pledged by *A*. It is the duty of *A*'s executors, if the state of the testator's assets will allow them, to allow *B* to redeem the ring⁶.

(b) *A* bequeaths to *B* a zamindari, which at *A*'s death is subject to a mortgage for 10,000 rupees, and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² whether moveable or immoveable.

³ As to liabilities incident to the thing bequeathed, but not 'created by the testator' etc., see secs. 156, 157.

⁴ As where there is a direction that the debts should be paid out of

some other fund. But a general direction to pay 'all just debts as soon as may be' is not enough to show a contrary intention, *Pembrooke v. Friend*, 1 J. & H. 132. See now in England, 30 & 31 Vic. c. 69, sec. 1.

⁵ Nor is a lien for unpaid purchase-money, sec. 155, ill. (a), and *Hood v. Hood*, 26 L. J. Ch. 616.

⁶ They are not bound, as in England, to redeem it themselves.

at *A*'s death. *B*, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and *A*'s estate, to pay the sum of 11,000 rupees thus due.

Completion of testator's title to things bequeathed to be at cost of his estate.

155. Where any thing is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Illustrations.

(a) *A* having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to *B*, and dies before he has paid the purchase-money. The purchase-money must be made good out of *A*'s assets.

(b) *A* having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to *B*, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of *A*'s assets¹.

Exoneration of legatee's immovable property for which land-revenue or rent is payable periodically.

156. Where there is a bequest of any interest in immovable property, in respect of which payment in the nature of land revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them up to the day of his death².

Illustration.

A bequeaths to *B* a house, in respect of which 365 rupees are payable annually by way of rent. *A* pays his rent at the usual time, and dies 25 days after. *A*'s estate shall make good 25 rupees in respect of the rent.

Exoneration of specific legatee's stock in a Joint Stock Company.

157. In the absence of any direction in the Will, where there is a specific bequest of stock³ in a Joint Stock Company, if any call or other payment is due from the testator at the time of his death⁴ in respect of such stock³, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate; but if any call or other payment shall, after the testator's death, become due in respect of such stock³, the same shall, as between the testator's estate

¹ And see ill. (b) to sec. 157, *infra*.

² Compare in England the Apportionment Act, 33 & 34 Vic. c. 35, s. 2.

³ or shares.

⁴ As to the rule in England, see *Day v. Day*, 1 Dr. & Sm. 261, where

and the legatee, be borne by the legatee if he accept the bequest¹.

Illustrations.

(a) *A* bequeathed to *B* his share in a certain railway. At *A*'s death there was due from him the sum of 5*l.* in respect of each share, being the amount of a call which had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by *A*'s estate.

(b) *A* has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 5*l.* in respect of each share, which sum must be paid before his title to the shares can be completed. *A* bequeaths these shares to *B*. The estate of *A* must make good the payments which were necessary to complete *A*'s title.

(c) *A* bequeaths to *B* his shares in a certain railway. *B* accepts the legacy. After *A*'s death, a call is made in respect of the shares. *B* must pay the call.

(d) *A* bequeaths to *B* his shares in a joint stock company. *B* accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee².

(e) *A* is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of 3*l.* per share, payable by three instalments. *A* bequeaths his shares to *B*, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. *A*'s estate must pay the first instalment, and *B*, if he accepts the legacy, must pay the remaining instalments.

Kindersley V.C. said that if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate; but if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee.

¹ Where the person named as legatee repudiates the bequest, he cannot of course be subjected to any of the

liabilities attaching to the testator's interest, *Moffett v. Bates*, 3 Sm. & Giff. 468.

² On the other hand, *B* is entitled to all benefits accruing by reason of the possession of the shares, such as a right to compensation for concealment and misrepresentation by the directors, *The Carron Co. v. Hunter*, L. R. 1 Sc. App. 362.

PART XXIII.

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS¹.

Bequest of
thing de-
scribed in
general
terms.

158. If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Illustrations.

(a) *A* bequeaths to *B* a pair of carriage horses, or a diamond ring. The executor must provide the legatee with such articles, if the state of the assets will allow it².

(b) *A* bequeaths to *B* 'his pair of carriage horses.' *A* had no carriage horses at the time of his death. The legacy fails.

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces, and the towns of Madras and Bombay, Act XXI of 1870.

² Wms. Exors. 1164.

PART XXIV.

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND¹.

159. Where the interest or produce of a fund² is bequeathed to any person, and the Will affords no indication of an intention that the enjoyment of the bequest should be of limited duration³, the principal as well as the interest shall belong to the legatee.

Bequest of the interest or produce of fund.

Illustrations.

(a) *A* bequeaths to *B* the interest of his 5 per cent. promissory notes of the Government of India. There is no other clause in the Will affecting those securities. *B* is entitled to *A*'s 5 per cent. promissory notes of the Government of India.

(b) *A* bequeaths the interest of his 5½ per cent. promissory notes of the Government of India to *B* for his life, and after his death to *C*. *B* is entitled to the interest of the notes during his life, and *C* is entitled to the notes upon *B*'s death.

(c) *A* bequeaths to *B* the rents of his lands at *X*. *B* is entitled to the lands⁴.

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² Here 'fund' includes any property, whether moveable or immoveable, from which profit accrues; see ill. (c).

³ Such intention will not be inferred merely from the fact that in other

parts of the will the testator has used words expressly conferring an unlimited interest, *Wieden v. Wieden*, 2 Sm. & G. 396, 405.

⁴ for the whole of *A*'s interest therein. So in England a devise of the income of lands by their owner in fee now passes the fee, *Mannox v. Greener*, L. R. 14 Eq. 456.

PART XXV.

OF REQUESTS OF ANNUITIES ¹.

Annuity created by Will payable for life only, unless contrary intention apparent.

160. Where an annuity is created by Will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the Will ². And this rule shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(a) *A* bequeaths to *B* 500 rupees a year. *B* is entitled during his life to receive the annual sum of 500 rupees.

(b) *A* bequeaths to *B* the sum of 500 rupees monthly. *B* is entitled during his life to receive the sum of 500 rupees every month.

(c) *A* bequeaths an annuity of 500 rupees to *B* for life, and on *B*'s death to *C*. *B* is entitled to an annuity of 500 rupees during his life. *C*, if he survives *B*, is entitled to an annuity of 500 rupees from *B*'s death until his own death.

Period of vesting where Will directs that annuity be provided out of property or money bequeathed to buy one.

161. Where the Will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of an annuity for any person ³, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him, or to receive the money appropriated for that purpose by the Will ⁴.

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² Wms. Exors. 1200. In England, when a particular sum is bequeathed to be invested in the purchase of an annuity, the annuitant is entitled (in

the absence of any direction to the contrary) to a perpetual annuity or the particular sum so invested.

³ or for the life of any person.

⁴ If the legatee die before the testator, or before the money is laid out, the money belongs to the legatee's representatives, Wms. Exors. 1202.

Illustrations.

(a) *A* by his Will directs that his executors shall out of his property purchase an annuity of 1,000 rupees for *B*. *B* is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

(b) *A* bequeaths a fund to *B* for his life, and directs that after *B*'s death it shall be laid out in the purchase of an annuity for *C*. *B* and *C* survive the testator. *C* dies in *B*'s lifetime. On *B*'s death the fund belongs to the representative of *C*.

162. Where an annuity¹ is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the Will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the Will². Abatement of annuity.

163. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose³. Priority of annuitant to residuary legatee.

¹ whether payable at the testator's death or at some future time. In this and the following section 'annuity' seems to mean an annuity created by the will and charged on the testator's estate.

² The annuity is a general legacy. Therefore, as between annuitants and legatees there is no priority where there is a deficient estate, but both must abate proportionably. The principle equally applies whether the an-

nuity commences immediately on the death of the testator or at a future period, or whether the legacies be immediate or on the death of the annuitant. If annuities abate with reference to other legacies, they must of course abate between themselves (Wms. Exors. 1373). As to the mode of valuing annuities, see *Todd v. Bickley*, 27 Beav. 353.

³ 3 D. M. G. 995, per Turner, L. J.

PART XXVI.

OF LEGACIES TO CREDITORS AND PORTIONERS¹.

Creditor
primd facie
entitled to
legacy as
well as
debt. **164.** Where a debtor bequeaths a legacy to his creditor, and it does not appear from the Will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

Child
primd facie
entitled to
legacy as
well as
portion. **165.** Where a parent who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his Will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Illustration.

A, by articles entered into in contemplation of his marriage with *B*, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, *A* bequeaths 20,000 rupees to each of the married daughters of himself and *B*. The legatees are entitled to the benefit of this bequest in addition to their portions.

No ademp-
tion by
subsequent
provision
for legatee. **166.** No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

Illustrations.

(a) *A* bequeaths 20,000 rupees to his son *B*. He afterwards gives to *B* the sum of 20,000 rupees. The legacy is not thereby adeemed.

(b) *A* bequeaths 40,000 rupees to *B*, his orphan niece, whom he had brought up from her infancy. Afterwards, on the occasion of *B*'s marriage, *A* settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

¹ This Part applies to the wills of Hindús etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870. It differs from

the English law on the subject. See Wms. Exors., 8th ed., 1302, 1306, 1326, and *supra*, p. 308.

PART XXVII.

OF ELECTION¹.

167. Where a man², by his Will³, professes to dispose of something⁴ which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case he shall give up any benefits which may have been provided for him by the Will⁵.

Circumstances in which election takes place.

168. The interest so relinquished shall devolve as if it had not been disposed of by the Will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the Will.

Devolution of interest relinquished by the owner.

169. This rule will apply whether the testator does or does not believe that which he professes to dispose of by his Will to be his own.

Testator's belief as to his ownership immaterial.

Illustrations.

(a) The farm of Sultānpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultānpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(b) A bequeaths an estate to B in case B's elder brother (who is

¹ This Part applies to the wills of Hindūs etc. in the Lower Provinces and the towns of Madras and Bombay, Act XXI of 1870.

² See secs. 3 and 46.

³ i.e. on the face of his will. Parol evidence is inadmissible for the purpose of showing the testator's intention to dispose of property not his own.

⁴ i.e. some interest, whether im-

mediate, remote, contingent, of value or not of value, in property, whether moveable or immoveable, Wms. Exors. 1448.

⁵ Accordingly, in India, the principle upon which the doctrine of election proceeds is forfeiture, and not indemnification of those whom the dissent disappoints. Otherwise in England, Wms. Exors. 1455, 1456.

married and has children) shall leave no issue living at his death. *A* also bequeaths to *C* a jewel, which belongs to *B*. *B* must elect to give up the jewel, or to lose the estate.

(c) *A* bequeaths to *B* 1,000 rupees, and to *C* an estate which will under a settlement belong to *B* if his elder brother (who is married, and has children) shall leave no issue living at his death. *B* must elect to give up the estate, or to lose the legacy¹.

(d) *A*, a person of the age of 18, domiciled in British India, but owning real property in England, to which *C* is heir-at-law, bequeaths a legacy to *C*, and subject thereto devises and bequeaths to *B* 'all his property, whatsoever and wheresoever,' and dies under 21. The real property in England does not pass by the Will². *C* may claim his legacy without giving up the real property in England.

Bequest for man's benefit how regarded for the purpose of election. **170.** A bequest for a man's³ benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultánpur Khurd being the property of *B*, *A* bequeathed it to *C*; and bequeathed another farm called Sultánpur Buzurg to his own executors, with a direction that it should be sold, and the proceeds applied in payment of *B*'s debts. *B* must elect whether he will abide by the Will, or keep his farm of Sultánpur Khurd in opposition to it.

Person deriving benefit indirectly not put to his election. **171.** A person taking no benefit directly under the Will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultánpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultánpur to *B*, and 1,000 rupees to *C*. *C* dies intestate, shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C*'s estate to take under the Will. In that capacity he receives the legacy of 1,000 rupees, and accounts to *B* for the rents of the lands of Sultánpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultánpur in opposition to the Will.

Person taking **172.** A person who in his individual capacity takes a

¹ This and ill. (b) show that the doctrine of election is applicable to contingent interests.

² Because *A* by English law is an infant, and therefore incapable of

making a will, and succession to immoveable property is regulated by the *lex loci rei sitae* (sec. 4).

³ Sec. 3.

benefit under the Will, may in another character elect to take in opposition to the Will.

Illustration.

The estate of Sultánpur is settled upon *A* for life, and after his death upon *B*. *A* leaves the estate of Sultánpur to *D*, and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B*'s only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultánpur in opposition to the Will, and to relinquish the legacy of 2,000 rupees. *C* may do this, and yet claim his legacy of 1,000 rupees under the Will.

under Will in his individual capacity, may in another character elect to take in opposition to it.

Exception to the six last Rules.—Where a particular gift is expressed in the Will to be in lieu of something belonging to the legatee, which is also in terms disposed of by the Will, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the Will¹.

Illustration.

Under *A*'s marriage settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultánpur during her life.

A by his Will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interest in the estate of Sultánpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000*l.* The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000*l.*

173. Acceptance of a benefit given by the Will constitutes an election by the legatee to take under the Will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election², or if he waives inquiry into the circumstances.

When acceptance of benefit given by Will constitutes election to take under Will.

Illustrations.

(a) *A* is owner of an estate called Sultánpur Khurd and has a life interest in another estate called Sultánpur Buzurg to which,

¹ See a case in 12 Cal. 60, where a Hindú widow was held to have elected to take under the will of her husband's uncle, which purported to dispose of her husband's share.

² The Act is silent as to how the

legatee is to obtain knowledge of 'those circumstances.' In England, he is entitled to ascertain the value of the funds, and for that purpose may sustain a bill to have all necessary accounts taken.

upon his death, his son *B* will be absolutely entitled. The Will of *A* gives the estate of Sultánpur Khurd to *B*, and the estate of Sultánpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultánpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultánpur Khurd. *B* has not confirmed the bequest of Sultánpur Buzurg to *C*.

(*b*) *B*, the eldest son of *A*, is the possessor of an estate called Sultánpur. *A* bequeaths Sultánpur to *C*, and to *B* the residue of *A*'s property. *B*, having been informed by *A*'s executors that the residue will amount to 5,000 rupees, allows *C* to take possession of Sultánpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultánpur to *C*.

Presumption arising from enjoyment by legatee for two years.

174. Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the Will without doing any act to express dissent¹.

Confirmation of bequest by act of legatee.

175. Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to *B* an estate to which *C* is entitled, and to *C* a coal mine. *C* takes possession of the mine, and exhausts it. He has thereby confirmed the bequest of the estate to *B*.

When testator's representatives may call upon legatee to elect.

176. If the legatee shall not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the Will, the representatives shall, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the Will.

Postponement of election in case of disability.

177. In case of disability the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

¹ Until the two years have expired, a person having elected under a misconception seems entitled to make a fresh election.

Where either of the subject-matters

of election is reversionary the two years will not begin to run till the reversion falls in.

The presumption arising under this section may be rebutted.

PART XXVIII.

OF GIFTS IN CONTEMPLATION OF DEATH¹.

178. A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by Will. A gift is said to be made in contemplation of death where a man who is ill and expects to die shortly of his illness, delivers² to another³ the possession⁴ of any moveable property⁵ to keep as a gift in case the donor shall die of that illness⁶. Such a gift may be resumed by the giver. It does not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made⁷.

Property transferable by gift made in contemplation of death.
Such gift resumable. When it fails.

Illustrations.

(a) *A* being ill, and in expectation of death, delivers to *B*, to be retained by him in case of *A*'s death—

A watch.

A bond granted by *C* to *A*.

A bank note.

A promissory note of the Government of India endorsed in blank.

A bill of exchange endorsed in blank.

Certain mortgage deeds.

¹ This Part (which agrees with the English law on the subject) does not apply to Hindús, etc., Act XXI of 1870. As to *donatio mortis causa* by a Hindú, see 3 Ben. O. C. J. 113, 6 Mad. H. C. 270.

² by himself or another. There must be delivery. Deed without delivery is not enough.

³ The gift may be either to the donee or to some one else for his use. And the donee may be directed to use the property for a particular purpose, or out of it to make certain payments, and to keep the residue for himself, 8 M. & W. 404, per Alderson B.

⁴ i. e. not merely *detentio* or *corpus*,

but also *animus domini*, supra, p. 56; 10 Sim. 244.

⁵ or the means of coming at such possession: see ill. (b).

⁶ It is not necessary that the donor should expressly declare that the gift is subject to that condition.

A trust may be annexed to the gift, 8 M. & W. 401, where the trust was that the donee should provide the donor's funeral. So where India bonds were given subject to the condition of the donee carrying on a suit, *Blount v. Barrow*, 4 Bro. Ch. C. 72.

⁷ It may be satisfied by a legacy given to the donee; but it cannot be revoked by a subsequent will, *Wms. Exors.* 787.

A dies of the illness during which he delivered these articles.
B is entitled to—

The watch.

The debt secured by *C*'s bond.

The bank note.

The promissory note of the Government of India.

The bill of exchange.

The money secured by the mortgage deeds¹.

(b) *A* being ill, and in expectation of death, delivers to *B* the key of a trunk, or the key of a warehouse in which goods of bulk belonging to *A* are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of *A*'s death. *A* dies of the illness during which he delivered these articles. *B* is entitled to the trunk and its contents, or to *A*'s goods of bulk in the warehouse.

(c) *A* being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the names of *B* and *C*. The parcels are not delivered during the life of *A*. *A* dies of the illness during which he set aside the parcels. *B* and *C* are not entitled to the contents of the parcels.

¹ In most of these cases the property passes to the donee by delivery. As to the mortgage-deeds the Act follows the decision of the H. L. in *Duffield v. Elwes*, 1 Bligh, N. S. 498. A policy of insurance and a banker's

deposit note may also be the subject of a *d. m. c.* As to bills of exchange and promissory notes not payable to bearer there is in England some doubt. But see *Veal v. Veal*, 27 Beav. 303.

PART XXIX.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

179. The executor or administrator¹, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person² vests in him as such³.

Character
and prop-
erty of
executor
as such.

180. When a Will has been proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the Province, whether in the British dominions, or in a foreign country, and a properly authenticated copy of the Will is produced, letters of administration may be granted with a copy of such copy annexed⁴.

Admini-
stration
with copy
annexed of
authenti-
cated copy
of Will
proved
abroad.

181. Probate can be granted only to an executor appointed by the Will⁵.

Probate to
executor
appointed
by Will.

182. The appointment may be express or by necessary implication⁶.

Appoint-
ment ex-
press or
implied.

Illustrations.

(a) *A* wills that *C* be his executor if *B* will not; *B* is appointed executor by implication.

(b) *A* gives a legacy to *B* and several legacies to other persons, among the rest to his daughter-in-law⁷, *C*, and adds, 'but should

¹ Sec. 3.

² i.e. his actual property, whether held by him for his own benefit or the benefit of others. It does not include property vested in him as executor or administrator under this Act, 12 Ben. 428, 429.

³ Act V of 1881, sec. 4.

⁴ Act V of 1881, sec. 5.

⁵ Act V of 1881, sec. 6. This, apparently, would preclude the granting of probate to a person nominated as executor by the legatees, or by other persons appointed executors. In England, where a testatrix concluded her

will thus, 'I must beg *A* to appoint some one to see this my will executed,' it was held that *A* might appoint himself, and the Court granted probate to him, *In the goods of Ryder*, 2 S. & T. 127.

⁶ i.e. 'so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed,' 1 V. & B. 466, per Lord Eldon citing Lord Hardwicke.

⁷ This includes the wife of an adopted son, Act XXI of 1870, sec. 6.

the within-named *C* be not living, I do constitute and appoint *B* my whole and sole executrix.' *C* is appointed executrix by implication.

(c) *A* appoints several persons executors of his Will and Codicils, and his nephew residuary legatee, and in another Codicil are these words:—'I appoint my nephew my residuary legatee to discharge all lawful demands against my Will and Codicils, signed of different dates.' The nephew is appointed an executor by implication¹.

Persons to whom probate cannot be granted.

183. Probate cannot be granted to any person who is a minor² or is of unsound mind³, nor to a married woman without the previous consent of her husband⁴.

Grant of probate to several executors simultaneously or at different times.

184. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of *B*'s Will by express appointment, and *C* an executor of it by implication. Probate may be granted to *A* and *C* at the same time, or to *A* first and then to *C*, or to *C* first and then to *A*⁵.

Separate probate of Codicil discovered after grant.

185. If a Codicil be discovered after the grant of probate, a separate probate of that Codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the Will. If different executors are appointed by the Codicil, the probate of the Will must be revoked, and a new probate granted of the Will and the Codicil together⁶.

Accrual of representa-

186. When probate has been granted to several executors,

¹ Act V of 1881, sec. 7. So when *A* by his will appointed *B* to receive and pay *A*'s debts, and to get in and distribute *A*'s personal estate, the Calcutta High Court (following *In the goods of Baylis*, L. R., 1 P. & D. 21) held that *B* was appointed executor by implication, 5 Cal. 756.

So when a Hindú bequeathed all his property to his widow, mentioning no executor, 7 Ben. 563. So when a Hindú appointed his widow guardian of her infant children 'in order that of all his property she should carry on the management' (until his youngest son should attain 22 years of age), 'and in the testator's name the management of his firm,' 7 Bom. H. C., A. C. J. 64.

² Where a minor is appointed sole executor, sec. 215 provides that letters of administration may be granted to his guardian.

³ If an executor become *non compos*, the Court may commit administration to another.

⁴ Act V of 1881, sec. 8, omitting the words relating to a married woman.

A corporation aggregate may be named executor, and they appoint syndics to receive administration with the will annexed:

⁵ Act V of 1881, sec. 9.

⁶ Act V of 1881, sec. 10: Coote's Common Form Practice, ninth ed., pp. 54, 55.

and one of them dies, the entire representation of the testator accrues to the surviving executor or executors ¹.

187. No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province ² shall have granted probate ³ of the Will under which the right is claimed, or shall have granted letters of administration under the one hundred and eightieth Section ⁵.

188. Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such ⁶.

189. Letters of administration cannot be granted to any person who is a minor ⁷ or is of unsound mind ⁸, nor to a married woman without the previous consent of her husband ⁹.

190. No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction ¹⁰.

191. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death ¹¹.

¹ Act V of 1881, sec. 11.

² See infra, note 10, and secs. 235, 264.

³ Sec. 3. See 1 Ben. O.C. 3, where A died in the Panjáb; and the Calcutta High Court held that it could not grant to the attorney of his executor B letters of administration *c. t. a.* as regards assets situate in the Panjáb.

⁴ See sec. 3, supra: 22 Suth. 174.

⁵ As the first step in a suit in India is the presentation of a verified plaint, which must show the character in which the plaintiff sues (Act XIV of 1882, sec. 50), and as all documents on which he relies must be produced in court when the plaint is presented, it would seem that an executor cannot even commence a suit before probate.

For the purpose of sec. 187 there must be either probate or letters of administration. A certificate under Act XXVII of 1860 will not suffice, 23 Suth. 252.

⁶ Act V of 1881, sec. 12: 4 Cal. 362.

⁷ See sec. 215 as to administration where the sole residuary legatee is a minor.

⁸ See sec. 217, infra.

⁹ Act V of 1881, sec. 13, omitting the words relating to a married woman.

¹⁰ 4 All. 192. In reading this section regard must be had to Act XXVII of 1860 and to the powers of the Administrator-General under Act II of 1874, secs. 36-40, to grant a certificate entitling the holder to receive property to a value not exceeding Rs. 1000.

As regards the Administrator-General of any of the Presidencies, the High Court at the Presidency Town is to be deemed a court of competent jurisdiction within the meaning of secs. 187 and 190, Act II of 1874, sec. 14.

¹¹ Act V of 1881, sec. 14. As to the administrator's right to recover against a wrongdoer who has seized or converted the goods of the intestate after his death, Wms. Exors. 638.

Acts of administrator not validated by letters. **192.** Letters of administration do not render valid any intermediate acts of the administrator, tending to the diminution or damage of the intestate's estate ¹.

Grant where executor has not renounced. **193.** When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued ², calling upon the executor to accept or renounce his executorship; except that when one or more of several executors have proved a Will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved ³.

Form and effect of renunciation. **194.** The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing ⁴, and when made shall preclude him from ever thereafter applying for probate of the Will appointing him executor ⁵.

Where executor renounces or fails to accept within time limited. **195.** If the executor renounce, or fail to accept the executorship within the time limited for the acceptance or refusal thereof, the Will may be proved and letters of administration, with a copy of the Will annexed, may be granted to the person who would be entitled to administration in case of intestacy ⁶.

Grant to universal or residuary legatee. **196.** When the deceased has made a Will, but has not appointed an executor, or when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the Will, or when the executor dies after having proved the Will but before he has administered all the estate of the deceased; an universal or a residuary legatee may ⁷ be admitted to prove the Will, and letters of administration with the Will annexed may ⁷ be

¹ Act V of 1881, sec. 15.

² No term is fixed within which the citation is returnable.

³ Act V of 1881, sec. 16.

⁴ He cannot renounce after probate, and his renunciation must show in substance that he has not intermeddled.

⁵ Act V of 1881, sec. 17. Compare in England 20 & 21 Vic. c. 77, sec. 79. In England, and probably also

in India, the renunciation cannot be partial, and cannot be made after probate.

⁶ Act V of 1881, sec. 18.

⁷ The word 'may' is here, not permissive, but directory, 12 Ben. 428. The universal or residuary legatee is the testator's choice, next after the executor. If several persons are entitled to the residue, administration may be granted to any of them.

granted to him of the whole estate, or of so much thereof as may be administered ¹.

197. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the Will annexed as such residuary legatee ². Right of residuary legatee's representative to administer.

198. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and letters of administration may be granted to him or them accordingly ³. Grant when no executor, residuary legatee, or representative of such legatee.

199. Letters of administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next of kin to accept or refuse letters of administration ⁴. Citation before grant to legatee not universal or residuary.

200. When the deceased has died intestate, those who are connected with him either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated. Order in which connections by marriage etc. entitled.

201. If the deceased has left a widow, administration shall be granted to the widow unless the Court shall see cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased. Administration to widow.

Illustrations.

(a) The widow is a lunatic, or has committed adultery, or has been barred by her marriage settlement of all interest in her husband's estate; there is cause for excluding her from the administration ⁵.

¹ Act V of 1881, sec. 19.

² Act V of 1881, sec. 20.

³ Act V of 1881, sec. 21. The Administrator-General's right is preferable to that of a creditor or of an

ordinary pecuniary legatee, *In re Viegas*, 1 Bom. H. C. 103.

⁴ Act V of 1881, sec. 22.

⁵ So if she have lived separate from her husband, deserted his children to

(b) The widow has married again since the decease of her husband; this is not good cause for her exclusion.

Persons associated with widow in administration.

202. If the Judge think proper, he may associate any person or persons with the widow in the administration, who would be entitled solely to the administration if there were no widow.

Grant of administration where no widow, or widow excluded.

203. If there be no widow, or if the Court see cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate; provided that when the mother of the deceased shall be one of the class of persons so entitled, she shall be solely entitled to administration.

Kindred of equal degree equally entitled.

204. Those who stand in equal degree of kindred to the deceased, are equally entitled to administration¹.

Right of widower to administer to wife.

205. The husband, surviving his wife, has the same right of administration of her estate as the widow has in respect of the estate of her husband.

Grant to creditor.

206. When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration, and willing to act, they may be granted to a creditor².

Where deceased has left property in India, administration granted according to foregoing rules.

207. Where the deceased has left property in British India, letters of administration must be granted according to the foregoing rules, although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India³.

lead an immoral life, or been divorced according to foreign law.

¹ See 1 Ben., Short Notes, iii.

² So that he may recover his debt. It matters not that the debt is barred by limitation, Wms. Exors. 1054,

note (v). The Administrator-General has a preferential right, Act II of 1874, sec. 15.

³ But as to distributing moveable property, see sec. 4.

PART XXX.

OF LIMITED GRANTS.

(a.) *Grants limited in Duration.*

208. When the Will has been lost or mislaid since the Probate of testator's death, or has been destroyed by wrong or accident copy or draft of lost Will. and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced ¹.

209. When the Will has been lost or destroyed ² and no Probate of copy has been made nor the draft preserved, probate may contents of lost or destroyed Will. be granted of its contents, if they can be established by evidence ³.

210. When the Will is in the possession of a person Probate of residing out of the Province in which application for probate copy where original exists. is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the Will or an authenticated copy of it be produced ⁴.

211. Where no Will of the deceased is forthcoming, but Admini- there is reason to believe that there is a Will in existence, stration until Will produced.

¹ Act V of 1881, sec. 24. As to the evidence to be produced by the executor, see Coote, 124.

² i.e. after the testator's death, or in his lifetime by another person without his consent, or by himself without intention.

³ Act V of 1881, sec. 25: 'evidence' includes parol evidence. See the case of Lord St. Leonards' Will, L. R. 1 Prob. Div. 154.

If a codicil has been similarly lost or destroyed, its contents may be proved in the same manner (Coote, 126); and where the contents of a lost will, in existence after the testator's death, are unknown the Court will grant administration limited until the original will be found and brought in.

⁴ Act V of 1881, sec. 26.

letters of administration may be granted, limited until the Will, or an authenticated copy of it, be produced ¹.

(b.) Grants for the Use and Benefit of others having Right.

Adminis-
tration,
with Will
annexed, to
attorney
of absent
executor.

212. When any executor is absent from the Province in which application is made, and there is no executor within the Province ² willing to act, letters of administration, with the Will annexed, may be granted to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself ³.

Adminis-
tration to
attorney of
absent per-
son, who, if
present,
would be
entitled.

213. When any person to whom, if present, letters of administration with the Will annexed might be granted, is absent from the Province, letters of administration with the Will annexed may be granted to his attorney, limited as above-mentioned ⁴.

Adminis-
tration to
attorney
of absent
person en-
titled in
case of
intestacy.

214. When a person entitled to administration in case of intestacy is absent from the Province, and no person equally entitled is willing to act, letters of administration may be granted to the attorney of the absent person, limited as before mentioned ⁵.

Adminis-
tration
during
minority.

215. When a minor is sole executor or sole residuary legatee, letters of administration, with the Will annexed, may be granted to the legal guardian ⁶ of such minor or to such other person as the Court shall think fit until the minor shall have completed the age of eighteen years, at which period, and not before, probate of the Will shall be granted to him ⁷.

Adminis-
tration

216. When there are two or more minor executors and no

¹ Act V of 1881, sec. 27.

² Sec. 3, supra.

³ Act V of 1882, sec. 28, substituting 'agent' for 'attorney.' The attorney (or 'agent') applying for letters of administration must be within the jurisdiction of the Court, 4 Ben. Appendix, 49.

⁴ Act V of 1881, sec. 29, substituting 'agent' for 'attorney.'

⁵ Act V of 1881, sec. 30, substituting 'agent' for 'attorney.'

⁶ i.e. a testamentary guardian under sec. 48, or a guardian appointed by the Court under Act XL of 1858: 'legal' here seems used in order to exclude mere 'natural' guardians.

⁷ Act V of 1881, sec. 31. So in England under 38 Geo. III, c. 87, sec. 6. As to the powers of an administrator during minority, see sec. 274, infra.

executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of eighteen years¹.

until one of several minor executors etc. attains majority.

217. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estates, be a lunatic², letters of administration, with or without the Will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority³, or if there be no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the lunatic until he shall become of sound mind⁴.

Administration for use and benefit of lunatic *jus habens*.

218. Pending any suit touching the validity of the Will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction⁵.

Administration *pendente lite*.

(c.) *For Special Purposes.*

219. If an executor be appointed for any limited purpose specified in the Will⁶, the probate shall be limited to that purpose, and if he should appoint an Attorney to take ad-

Probate limited to purpose specified in Will.

¹ Act V of 1881, sec. 32.

² This does not necessarily mean a person found by due course of law to be incapable of managing his affairs.

³ See as to lunatics in the Mufassal, Act XXXV of 1858, sec. 9, and as to other lunatics, Act XXXIV of 1858, secs. 12, 24.

⁴ Act V of 1881, sec. 33, but including minors, who were forgotten in drafting the Succession Act, sec. 217.

⁵ Act V of 1881, sec. 34, 20 & 21 Vic. c. 77, sec. 70. The grant de-

termines in the termination of the suit; but not upon the suit being carried up by appeal to a superior court.

⁶ As, for example, if the testator make *A* his executor for his property in Bengal, *B* for that in Madras, and *C* for that in Bombay. Or if he make *A* his executor for his property in England, and *B* for that in India. Or if he make *A* executor for his immoveable property, *B* for his debts due to him, and *C* for the rest of his moveable property.

ministration on his behalf, the letters of administration with the Will annexed shall accordingly be limited¹.

Adminis-
tration
with Will
annexed
limited to
particular
purpose.

220. If an executor appointed generally give an authority to an attorney to prove a Will on his behalf, and the authority is limited to a particular purpose, the letters of administration with the Will annexed shall be limited accordingly².

Adminis-
tration
limited to
property
in which
one has
beneficial
interest.

221. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the person beneficially interested in the property³, or to some other person on his behalf⁴.

Adminis-
tration
limited to
suit.

222. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution⁵.

Adminis-
tration
limited to
purpose of
becoming
party to
suit against
adminis-
trator.

223. If at the expiration of twelve months⁶ from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the Province within which the Court that has granted the probate or letters of administration is situate, it shall be lawful for such Court to grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought

¹ Act V of 1881, sec. 35.

² Act V of 1881, sec. 36.

³ i. e. the 'beneficiary' of the Trusts Act and the Probate Act, sec. 37.

⁴ Act V of 1881, sec. 221.

⁵ Act V of 1881, sec. 38.

⁶ i. e. at or after the expiration of twelve months, *In the Goods of Ruddy*, L. R., 2 P. & D. 330.

against the executor or administrator, and carrying the decree which may be made therein into effect¹.

224. In any case in which it may appear necessary for preserving the property of a deceased person, the Court within whose district any of the property is situate may grant to any person whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased², and giving discharges for debts due to his estate, subject to the directions of the Court³.

Adminis-
tration
limited to
collecting
and pre-
serving
deceased's
property.

225. When a person has died intestate, or leaving a Will of which there is no executor willing and competent to act, or where the executor shall, at the time of the death of such person, be resident out of the Province, and it shall appear to the Court to be necessary or convenient⁴ to appoint some person to administer the estate or any part thereof, other than the person who under ordinary circumstances would be entitled to a grant of administration, it shall be lawful for the Judge, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, to appoint such person as he shall think fit to be administrator, and in every such case letters of administration may be limited or not as the Judge shall think fit⁵.

Appoint-
ment as
adminis-
trator, of
person not
ordinarily
entitled to
administer.

(d.) Grants with Exception.

226. Whenever the nature of the case requires that an exception be made, probate of a Will, or letters of administration with the Will annexed, shall be granted subject to such exception⁶.

Probate
etc. with
exception.

¹ Act V of 1881, sec. 39. Founded on 38 Geo. III, c. 87, secs. 1 and 3.

² Or any part of his property within the jurisdiction, e. g. to sell a ship, to get in outstanding debts, to endorse and receive the amount of certain bills of exchange, etc.

³ Act V of 1881, sec. 40.

⁴ The corresponding English law here has 'in any such case by reason of the insolvency of the estate of the

deceased or other special circumstances,' 20 & 21 Vic. c. 77, sec. 73.

⁵ Act V of 1881, sec. 41.

⁶ Act V of 1881, sec. 42. If, for example, a testator appoints *A* executor for a special purpose or a specific fund only, and *B* an executor for all other purposes, *B* may take probate except for that purpose or fund. Coote, Common Form Practice, 164.

Adminis-
tration
with
exception.

227. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception ¹.

(e.) Grants of the Rest.

Probate or
adminis-
tration of
the rest.

228. Whenever a grant, with exception, of probate or letters of administration, with or without the Will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate ².

(f.) Grants of Effects unadministered.

Grant of
effects un-
adminis-
tered.

229. If the executor to whom probate has been granted have died leaving a part of the testator's estate unadministered, a new representative may ³ be appointed for the purpose of administering such part of the estate ⁴.

Rules as
to grants
of effects
unadminis-
tered.

230. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made ⁵.

Adminis-
tration
when
limited
grant has
expired
and part of
estate still
unadminis-
tered.

231. When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made ⁶.

¹ Act V of 1881, sec. 43. If, for example, a testator has made his Will for a particular or limited purpose only, and has died intestate as to all other property, his next of kin, without waiting for the executor to take the limited probate, may take administration of all the deceased's effects, save what the testator has himself excepted.

² Act V of 1881, sec. 44.

³ The word 'may' is here permissive, not directory, 12 Ben. 428.

⁴ Act V of 1881, sec. 45.

⁵ Act V of 1881, sec. 46; see sec. 196, supra. The existence of a derivative executor is not contemplated by the Act, and the representation is treated as coming to an end on the death of the executor, 12 Ben. 428.

⁶ Act V of 1881, sec. 47.

(g.) Alteration in Grants.

232. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly¹.

What errors may be rectified by Court.

233. If, after the grant of letters of administration with the Will annexed, a Codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly².

Procedure where Codicil discovered after grant of administration
c. l. a.

(h.) Revocation of Grants.

234. The grant of probate or letters of administration may be revoked or annulled for just cause.

Revocation or annulment for just cause, of grant of probate or administration.

Explanation.—Just cause is—1st, that the proceedings to obtain the grant were defective in substance; 2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; 3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; 4th, that the grant has become useless and inoperative through circumstances³.

Illustrations.

(a) The Court by which the grant was made had no jurisdiction.

(b) The grant was made without citing parties who ought to have been cited.

(c) The Will of which probate was obtained was forged or revoked.

¹ Act V of 1881, sec. 48.

² Act V of 1881, sec. 49. As to the procedure in such case, see Coote, Common Form Practice, 184.

³ This section applies to Hindús, 5 Bom. 638. It is = Act V of 1881, sec. 50.

That a grant must be contested in the Court out of which it issued and before the Court sitting as a Court of Probate, see 2 N. W. P. 268, 274.

As to the persons entitled to apply

for revocation of probate, see 2 N. W. P. 268. A legatee has a sufficient interest (ibid.). So has a judgment creditor who has, prior to grant of probate, attached property to which his debtor would be entitled as heir of the alleged testator: 6 Cal. 429, 460. So has a person interested by assignment in the alleged testator's estate, 4 Cal. 360; and see 2 Cal. 208.

(d) *A* obtained letters of administration to the estate of *B*, as his widow, but it has since transpired that she was never married to him.

(e) *A* has taken administration to the estate of *B* as if he had died intestate, but a Will has since been discovered.

(f) Since probate was granted, a later Will has been discovered.

(g) Since probate was granted, a Codicil has been discovered, which revokes or adds to the appointment of executors under the Will.

(h) The person to whom probate was or letters of administration were granted has subsequently become of unsound mind¹.

¹ But his subsequent immorality is not sufficient, 6 Cal. 11, where the Court thought that illustration (h) referred to the case of an executor whose subsequent lunacy was regularly established.

Other illustrations are: (i) an executor being a minor obtains probate of the Will on the tacit suggestion that he is of full age; (j) an executor obtains probate of the Will of a living person (*In the goods of C. J. Napier*, 1 Phillim. 83); (k) bastards claiming to be an intestate's next of kin have obtained administration to his estate.

See further, as to the grounds for revoking probate, the Evidence Act, I of 1872, sec. 44, and 6 Cal. 460.

Administration is not void, but voidable only when granted to a next of kin together with one next of kin, as to a sister and her husband: or to one of kin but not next of kin: or to a creditor before the renunciation of the next of kin, Wms. Exors. 586.

There is no ground for revocation, where administration has been granted to a younger, instead of an elder, brother; or to a niece instead of a nephew; or to a creditor for a smaller amount instead of to one for a larger amount; or to one where two had equal right; or where there is maladministration or the administrator omits to bring in an inventory and account, Wms. Exors. 588, 589.

PART XXXI.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

235. The District Judge shall have jurisdiction ¹ in granting and revoking probates and letters of administration in all cases within his District ².

Jurisdiction of District Judge.

235 A. The High Court may, from time to time, appoint such judicial officers within any district as it thinks fit, to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may from time to time prescribe :

Power to appoint District Delegates.

Provided that in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called ' District Delegates.'

236. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding depending in his Court ³.

District Judge's powers as to granting probate and administration.

237. The District Judge may order any person to produce and bring into Court any paper or writing being or purporting to be testamentary ⁴, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or

Power to order production of testamentary papers.

¹ The High Court has a concurrent jurisdiction, see sec. 264, *infra*, and 5 Cal. 756.

² This jurisdiction did not before the passing of this Act belong to the civil courts of the Mufassal. It can

be exercised only by the District Judge, 6 Cal. 471.

³ Act V of 1881, sec. 53.

⁴ e. g. an exemplification of a Will, 8 Ben. Appendix, 76.

writing, the Court may direct such person to attend for the purpose of being examined respecting the same, and such person shall be bound to answer such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code¹, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit, and had made such default, and the costs of the proceeding shall be in the discretion of the Judge².

Procedure of District Judge's Court in relation to probate &c.

238. The proceedings of the Court of the District Judge³ in relation to the granting of probate and letters of administration shall, except as hereinafter otherwise provided, be regulated so far as the circumstances of the case will admit by the Code of Civil Procedure⁴.

When and how District Judge interferes for protection of property.

239. Until probate be granted of the Will of a deceased person, or an administrator of his estate be constituted, the District Judge within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property, at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he shall see fit, to appoint an officer to take and keep possession of the property⁵.

Where probate or administration may be granted by District Judge.

240. Probate of the Will or letters of administration to the estate of a deceased person may be granted by the District Judge under the seal of his Court, if it shall appear by a petition verified as hereinafter mentioned, of the person applying for the same, that the testator or intestate, as the

¹ Act XLV of 1860, chap. x; supra, pp. 156, 157, 159.

² Act V of 1881, sec. 54.

³ Sec. 3.

⁴ Act XIV of 1882. Sec. 238 is = Act V of 1881, sec. 55. As an order made by a District Judge on an application for probate is not final, no reference for the opinion of the High Court upon such application can be

made under the Civ. P. Code, sec. 657, 5 Cal. 756.

⁵ See further, as to securing the property of a deceased person, the Regimental Debts Act, 26 & 27 Vic. c. 57, secs. 7 and 8; Act XIX of 1841, sec. 4; Act II of 1874, sec. 64; Ben. Reg. V of 1799, sec. 5; Mad. Reg. III of 1802, sec. 16; and Bom. Reg. VIII of 1827.

case may be, at the time of his decease, had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge ¹.

241. When the application is made to the Judge of a District in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another District, or where the application is for letters of administration, to grant them absolutely or limited to the property within his own jurisdiction ².

When application is made to Judge of District in which deceased had no fixed abode.

241 A. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death resided within the jurisdiction of such Delegate.

Probate and letters of administration may be granted by Delegate.

242. Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the Province in which the same is granted, and shall be conclusive as to the representative title ³ against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted ⁴.

Conclusiveness of probate or letters of administration.

Provided that probates and letters of administration granted by a High Court after the first day of April, 1875, shall, unless otherwise directed by the grant, have the like effect throughout British India ⁵.

242 A. Whenever a grant of probate or letters of administration is made by a High Court with such effect as last aforesaid, the Registrar or such other officer as the High Court

Transmission of certificate by High Court

¹ Act V of 1881, sec. 56.

² Act V of 1881, sec. 57.

³ The section is silent as to the effect of the probate with respect to the validity and contents of the Will,

6 All. 463.

⁴ 4 Cal. 362. Sec. 242 is = sec. 59 of Act V of 1881, with some additions.

⁵ Act XIII of 1875, sec. 2.

granting
probate
etc. to
other
Courts.

making the grant appoints in this behalf shall send to each of the other High Courts a certificate to the following effect :—

I, *A. B.*, Registrar (*or as the case may be*) of the High Court of Judicature at (*or as the case may be*), hereby certify that on the day of 187 the High Court of Judicature at (*or as the case may be*), granted probate of the will [*or letters of administration of the estate*] of *C. D.*, late of deceased, to *E. F.*, of and *G. H.* of , and that such probate [*or letters*] has [*or have*] effect over all the property of the deceased throughout the whole of British India; and such certificate shall be filed by the High Court receiving the same.

Conclu-
siveness of
application
for probate
or adminis-
tration.

243. The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration, and no such grant shall be impeached, by reason that the testator or intestate had no fixed place of abode, or no property within the District at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court¹.

Petition
for probate.

244. Application for probate shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will annexed, and stating the time of the testator's death, that the writing annexed is his last Will and testament, that it was duly executed, and that the petitioner is the executor therein named; and in addition to these particulars, when the application is to the District Judge, the petition shall further state that the deceased at the time of his death had his fixed place of abode, or had some property², moveable or immoveable, situate within the jurisdiction of the Judge; and when the application is to a District Delegate, the petition shall further state that the deceased, at the time of his death, resided within the jurisdiction of such delegate³.

¹ Act V of 1881, sec. 61.

² This seems to mean, had possession of some property, 4 C. L. R. 498, cited by Henderson, p. 259.

³ Act V of 1881, sec. 62. That the

Limitation Act does not apply to applications for probate, see 6 Cal. 60, 707, though, of course, long unexplained delay may throw doubt on the genuineness of the will propounded.

245. In cases wherein the Will is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or if the Will be in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner:—‘I (*A B*) do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof ¹.’

In what cases translation of Will to be annexed.

Verification of translation.

246. Applications for letters of administration shall be made by petition distinctly written as aforesaid, and stating the time and place of the deceased’s death, the family or other relatives of the deceased, and their respective residences, the right in which the petitioner claims, that the deceased left some property within the jurisdiction of the District Judge or District Delegate to whom the application is made, and the amount of assets which are likely to come to the petitioner’s hands; and when the application is to a District Delegate, the petition shall further state that the deceased at the time of his death resided within the jurisdiction of such Delegate ².

Petition for letters of administration.

246 A. Every person applying to a High Court for probate of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 244 and section 246 of this Act, that to the best of his belief no application has been made to any other High Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

Additional statements in petition for probate, etc.

Or, where any such application has been made, the High Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the High Court to which any application is made

¹ Act V of 1881, sec. 63.

the Administrator-General’s Act, II

² Act V of 1881, sec. 64. And see of 1874, sec. 6.

under the proviso to section 242 of this Act may, if it think fit, reject the same.

Petition for probate or letters of administration to be signed and verified.

247. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner or to the like effect :—

‘ I (*A B*), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief ¹.’

Verification of petition for probate, by one of the witnesses to the Will.

248. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the Will (when procurable), in the manner or to the effect following :—

‘ I (*C D*), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (*as the case may be*), (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence ²).’

Punishment for making false averment in petition or declaration.

249. If any petition or declaration which is hereby required to be verified shall contain any averment which the person making the verification knows or believes to be false; such person shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence ³.

District Judge may examine petitioner in person, require further evidence, and issue citations.

250. In all cases it shall be lawful for the District Judge or District Delegate, if he shall think proper, to examine the petitioner in person, upon oath or solemn affirmation, and also to require further evidence of the due execution of the Will, or the right of the petitioner to the letters of administration, as the case may be, and to issue citations calling upon all persons claiming to have any interest in the estate of the deceased ⁴ to

¹ Act V of 1881, sec. 66.

² Act V of 1881, sec. 67.

³ Act V of 1881, sec. 68: see Penal Code, supra, ch. xi. The words ‘or does not believe to be true,’ are not contained in the Succession Act, sec. 249.

⁴ i.e. persons having such an interest as would entitle them to sue in respect of the subject-matter of the estate; see 15 W. R. 351. Creditors of the next of kin of the deceased are not such persons, 6 Cal. 467, 470, nor (it has been held) are creditors of

come and see the proceeding before the grant of probate or letters of administration. The citation shall be fixed up in some conspicuous part of the Court-house, and also in the Office of the Collector of the District, and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct ¹. Publication of citation.

251. Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate; and immediately on a caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased resided at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same ². Caveat against grant of probate or administration.

252. The caveat shall be to the following effect:—‘Let nothing be done in the matter of the estate of *A B*, late of _____, deceased, who died on the _____ day of _____ at _____ without notice to *C D* of _____’ ³. Form of caveat.

253. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made, or notice thereof has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court shall think reasonable ⁴. After entry of caveat, no proceeding on petition until after notice to caveator.

253 A. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears District Delegate when not to grant

a person who would, in default of adoption, be the heir of the deceased, 2 Cal. 208; S. C. 25 Suth. 489. But see 4 Cal. 365, per Markby J. On a *bona fide* application for probate, the Court should not go into question as to the testator's power to dispose of the property comprised in the will, 4 Cal. 1, 360.

¹ Act V of 1881, sec. 69. That, when the application is unopposed, proof of the execution of the will is sufficient to warrant the grant of probate, see 7 C. L. R. 387: 23 Suth. 103.

² Act V of 1881, sec. 70.

³ Act V of 1881, sec. 71.

⁴ Act V of 1881, sec. 72

probate
or adminis-
tration.

to him that probate or letters of administration ought not to be granted in his Court.

Explanation.—By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

Power to
transmit
statement
to District
Judge in
doubtful
cases
where no
contention.

253 B. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Procedure
where
contention,
or District
Delegate
thinks pro-
bate etc.
should be
refused in
his Court.

253 C. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge; unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.

Grant of
probate to
be under
Court's
seal.
Form of
grant.

254. When it shall appear to the Judge or District Delegate that probate of a Will should be granted, he will grant the same under the seal of his Court in manner following:—

'I, Judge of the District of [or Delegate
appointed for granting probate or letters of administration in
(*here insert the limits of the Delegate's jurisdiction*)], hereby
make known that on the day of in the year
the last Will of late of , a copy whereof is
hereunto annexed, was proved and registered before me, and

that administration of the property and credits of the said deceased, and in any way concerning his Will, was granted to the executor in the said Will named, he having undertaken to administer the same, and to make a true inventory of the said property and credits, and to exhibit the same at or before the expiration of a year next ensuing, and also to render a true account thereof¹.

255. And wherever it shall appear to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the Will annexed, should be granted, he will grant the same under the seal of his Court in manner following:—

Grant of letters of administration to be under Court's seal.

'I, _____, Judge of the District of _____ [or Form of grant. Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that on the _____ day of _____ letters of administration (with or without the Will annexed, as the case may be) of the property and credits of _____, late of _____, deceased, were granted to _____, the father (or as the case may be) of the deceased, he having undertaken to administer the same, and to make a true inventory of the said property and credits, and to exhibit the same in this Court at or before the expiration of one year next ensuing, and also to render a true account thereof².'

256. Every person to whom any grant of administration shall be committed³ shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being, with one or more surety or sureties⁴, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge shall from time to time by any general or special order direct⁵.

Administration-bond.

¹ Act V of 1881, sec. 76. That the grant of probate does not prejudice the rights of any person who claims the property, see 4 Cal. 1.

² Act V of 1881, sec. 77.

³ It has been held by the Calcutta High Court that this includes an executor as well as an administrator, 7 Cal. 85. *Contra* 3 Mad. H. C. Appx. x. And the view of the Madras High Court is supported by the fact that

where the legislature meant bonds to be given by executors it said so; see Act V of 1881, sec. 78. The Administrator-General is exempted from entering into any administration-bond or giving other security on the grant of letters of administration to him in virtue of his office, Act II of 1874, sec. 12.

⁴ There is no power (as in England) to dispense with the sureties.

⁵ Act V of 1881, sec. 78, inserting

PART XXXII.

OF EXECUTORS OF THEIR OWN WRONG¹.

Executor
of his own
wrong.

265. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence², thereby makes himself an executor of his own wrong.

Exceptions. First.—Intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his funeral³ or for the immediate necessities of his family or property, does not make an executor of his own wrong⁴.

Second.—Dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his own wrong.

Illustrations.

(a) *A* uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy, or receives payment of the debts of the deceased. He is an executor of his own wrong.

(b) *A* having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(c) *A* sues as executor of the deceased, not being such. He is an executor of his own wrong.

¹ As to Hindú executors of their own wrong, see 2 Ind. Jurist, N. S. 234, 240.

² 1 Tayl. & B. 290.

³ i. e. in a manner suitable to the estate.

⁴ Nor does making an inventory of the property of the deceased, feeding his cattle, or repairing his houses, for these are offices merely of kindness and charity, Wms. Exors., 265, 266.

266. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrator, and payments made in a due course of administration¹.

Liability
of an ex-
ecutor of
his own
wrong.

¹ It seems doubtful in England how far an administrator is bound by his own acts as executor *de son tort*, Wms. Exors. 412, 413.

'The case of *Carmichael v. Carmichael* (2 Ph. 110) shows that an account settled between an administrator and an executor *de son tort* will not prevent the liability of the latter to account to the parties beneficially interested in the estate, and the

account taken in a suit in the absence of a party beneficially interested falls within the same rule. An accountability grounded on one relation cannot be transferred to and supported on another; and therefore an executorship *de son tort* cannot be modified into an agency (a distinct head of accountability), 1 Tayl. & Bell, 300, per Peel, C. J.

PART XXXIII.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

In respect
of causes
of action
surviving
the de-
ceased.

267. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and to distrain¹ for all rents due to him at the time of his death, as the deceased had when living².

Survival of
rights
of action
in favour
of or
against
deceased.

268. All demands whatsoever and all rights to prosecute or defend any action or special proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators³; except causes of action for defamation, assault as defined in the Indian Penal Code⁴, or other personal injuries not causing the death of the party⁵; and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

¹ An executor may distrain before probate. As to distress for rent in the Presidency Towns, see Act XV of 1882, c. viii; elsewhere, the Bengal Tenancy Act, VIII of 1885, ch. xii: Mad. Act VIII of 1865, secs. 14, 79, 80, 85, 86: Bom. Act V of 1879, secs. 88, 94: in the N. W. Provinces, Act XII of 1881, secs. 56, 57, 59: in Oudh, Act XIX of 1868, secs. 47, 49. In Ajmer the power to distrain was abolished by Reg. II of 1877, sec. 99.

² Act V of 1881, sec. 88. As to suits by and against an executor, see Civ. P. Code, secs. 44, 437, 438.

³ This is nearly the English law as to personal injuries. But the Indian Act goes further. In England, actions founded on what are called 'wrongs to the freehold' do not survive except in the cases mentioned in 3 & 4 Wm. IV., cap. 42, sec. 2 (= Act

XII of 1855). But sec. 268 extends to such injuries, and an executor or administrator may, for example, bring a suit for compensation for diverting a watercourse, obstructing lights, or cutting down trees in the lifetime of his testator or intestate.

⁴ Sec. 351, *supra*, p. 226.

⁵ If they do cause his death, and the deceased could, if alive, have maintained the action, a suit for damages may be brought under Act XIII of 1855, which is = Lord Campbell's Act (9 & 10 Vict., c. 93), with the additional provision that in any such suit the deceased's representative may 'recover any pecuniary loss to the estate of the deceased caused by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the deceased.'

Illustrations.

(a) A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(b) A sues for divorce. A dies. The cause of action does not survive to his representative¹.

269. An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit.

Powers of executor or administrator to dispose of deceased's property.

Illustrations.

(a) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid².

(b) The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid³.

270. If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold⁴.

Purchase by executor or administrator of deceased's property.

271. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the Will or taken out administration.

Powers of several executors or administrators exercise-able by one.

Illustrations.

(a) One of several executors has power to release a debt due to the deceased.

(b) One has power to surrender a lease.

(c) One has power to sell the property of the deceased, moveable or immoveable⁵.

¹ Act V of 1881, sec. 89, omitting illustration (b); see Acts XII and XIII of 1855.

² And the concurrence of the legatee is unnecessary.

³ And, apparently, he may confer a power of sale on the mortgagee, 1 All. 710, following *Russell v. Plaice*, 18 Beav. 21, and *Bridges v. Longman*, 24

Beav. 27. See *Suth.*, Jan.-July, 1864, p. 99.

⁴ Act V of 1881, sec. 91. And the High Court, N. W. P., seem to think that an assignment to an executor by a legatee of his legacy is void, 1 All. 753.

⁵ But it is desirable to get all the executors to concur in order to guard

(d) One has power to assent to a legacy¹.

(e) One has power to endorse a promissory note payable to the deceased.

(f) The Will appoints *A, B, C* and *D* to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor².

Survival of powers on death of co-executor.

272. Upon the death of one or more of several executors or administrators, all the powers of the office become vested in the survivors or survivor³.

Administrator of effects unadministered.

273. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator⁴.

Administrator during minority.

274. An administrator during minority has all the powers of an ordinary administrator⁵.

Married executrix or administratrix.

275. When probate or letters of administration have been granted to a married woman, she has all the powers of an ordinary executor or administrator⁶.

against the possible event of a sale having been made by any other executor.

¹ Even to his own legacy.

² Act V of 1881, sec. 92. As to the effect of this illustration, see *supra*, p. 304.

³ Act V of 1881, sec. 93. See *Wms. Exors.* 481, 955. After 'become' the words 'in the absence of any direction to the contrary in the will or grant of letters of administration'

should be inserted.

⁴ Act V of 1881, sec. 94.

⁵ Act V of 1881, sec. 95. His powers are not limited as in England, where he cannot sell the goods of the deceased, or to a term of years any further than is necessary for the payment of debt.

⁶ Act V of 1881, sec. 96. As to her husband's consent, see secs. 183, 189, *supra*.

PART XXXIV.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

276. It is the duty of an executor to perform the funeral of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose ^{As to deceased's funeral.} ¹.

277. An executor or administrator shall, within six months from the grant of probate or letters of administration, exhibit in the Court by which the same may have been granted an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that may have come to his hands, and the manner in which they have been applied or disposed of ^{Inventory and account.} ².

277 A. In all cases where it is sought to obtain a grant of probate or letters of administration intended to have effect throughout the whole of British India, the executor, or the person applying for administration after the first day of April, 1875, to the effects, of any person dying in British India and leaving property in more than one Province, shall include in the inventory of the effects of the deceased his moveable or immoveable property situate in each of the Provinces: And the value of such property situate in the said Provinces, respectively, shall be separately stated in such inventory, and ^{Inventory may include property in any part of British India.}

¹ Act V of 1881, sec. 97, with slight modification. See *Mullick v. Mullick*, 1 Knapp 245, as to the expenses of

the funeral obsequies of a Hindú testator.

² Act V of 1881, sec. 98.

the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

Duty of
executor as
to property
of deceased.

278. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death ¹.

Expenses
to be paid
before
debts.

279. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death ², are to be paid before all debts ³.

Costs of
probate
to be paid
next after
such ex-
penses.

280. The expenses of obtaining probate or letters of administration, including the costs ⁴ incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges ⁵.

Wages for
certain
services
to be next
paid, and
then the
other
debts.

281. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan, or domestic servant ⁶ are next to be paid, and then the other debts of the deceased ⁷.

¹ Act V of 1881, sec. 100. An executor is responsible if he allows money to remain on personal security longer than is absolutely necessary. Wms. Exors., 1812, 1813, and see sec. 328, *infra*, ill. (b).

² This provision as to board and lodging was introduced with a view of ensuring a comfortable abode for the sick.

³ Act V of 1881, sec. 101. See the Regimental Debts Act, 26 & 27 Vic. c. 57, sec. 21, in accordance with which the Administrator-General is bound to administer military estates.

⁴ As to these, the following passage may be quoted: 'First, if the cause of litigation take its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate. Secondly, if there be sufficient and reasonable

ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent, *Mitchell v. Gard*, 3 Sw. & T. 278.

⁵ Act V of 1881, sec. 102.

⁶ As to the persons included in 'domestic servant,' see 8 Ben. 244 (*serang*): 9 Ben. App. 5 (*washerman*). A *dirzi* (tailor) is not one, 3 Bom. H. C., Appx. 21.

⁷ Act V of 1881, sec. 103, adding: 'according to their respective priorities, if any.' This addition was suggested by the decision in 12 Ben. 287.

282. Save as aforesaid, no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal, or on any other account¹. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend².

Save as aforesaid, all debts to be paid equally and rateably.

283. If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of the country in which he was domiciled³.

Application of moveable property to pay debts, where deceased not domiciled in India.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 10,000 rupees, immoveable property to the value of 5,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The debts on the instruments under seal are to be paid in full out of the moveable estate, and the proceeds of the immoveable estate are to be applied as far as they will extend towards the discharge of the debts not

¹ The words 'on any other account' apply to matters *eiusdem generis* with what precedes. As to the priority of a decree holder, see 10 Cal. 929, following 12 Ben. 287.

² Act V of 1881, sec. 104. This section does not enable the executor or administrator, where a decree has been obtained against him, to say that no portion of the assets of the deceased is to be paid in satisfaction of that decree, but that he is to deal with them just as if no decree had been passed, 12 Ben. 288. An administrator who pays debts otherwise than as directed by this section is personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets. A liability to pay calls in such a debt; but the administrator must have actual, as distinguished from constructive or imputable knowledge that the call has been made, 8 Bom. H. C. 20.

It was formerly held that an executor might pay a debt justly due to another person although barred by the

Limitation Act in the testator's lifetime, and that he might retain a debt due to himself, 2 Mad. H. C. 255, although so barred, 1 Mad. 267: 10 Bom. H. C. 206, 214. And since under the present Limitation Act (XV of 1877, sec. 28) a time-barred debt is not extinguished, it would seem that an executor may still pay such a debt; see 6 Cal. 355.

³ 1 Cal. 421. Thus, when the deceased, dying in India, is domiciled in England, his moveable property will be applied (after payment of the solicitor's charging-lien, if any) in payment of (1) debts due to the Crown by record or specialty; (2) debts to which particular statutes give priority; (3) debts of record (judgments duly entered and docketed, decrees, recognizances); (4) debts due to the Crown by simple contract; (5) debts by specialty (but not voluntary bonds), and debts for rent (except for land out of England); (6) debts by simple contract; (7) voluntary bonds and voluntary promissory notes.

under seal. Accordingly, one-half of the amount of the debts not under seal is to be paid out of the proceeds of the immoveable estate.

Creditor paid in part under section 283 to bring payment into account before sharing in proceeds of immoveable property.

284. No creditor who has received payment of a part of his debt by virtue of the last preceding Section shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged ¹. This will leave 5,000 rupees, which are to be distributed rateably amongst all the creditors without distinction in proportion to the amount which may remain due to them.

Debts paid before legacies.

285. Debts of every description must be paid before any legacy ².

Executor not bound to pay legacies without indemnity.

286. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due ³.

Abatement of general legacies.

Executor not to favour legatee.

287. If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and ⁴ the executor has no right to pay one legatee in preference to another ⁵, nor to retain any money on

¹ The Court 'marshalls the assets.'

² Act V of 1881, sec. 105.

³ Act V of 1881, sec. 106.

⁴ The words 'in the absence of any direction to the contrary in the will' have been erroneously omitted.

⁵ This probably refers only to legatees who are all volunteers. For if

there be any valuable consideration for the testamentary gift (as where a general legacy is given in consideration of a debt owing to the legatee by the testator at the death of the latter), such legacy should be paid preferably to the other general legacies, which are mere bounties, see *Wms. Exors.*, p. 1370.

account of a legacy to himself or to any person for whom he is a trustee¹.

288. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement².

Non-abatement of specific legacy when assets sufficient.

289. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder³.

Right of demonstrative legatee when assets sufficient.

290. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Rateable abatement of specific legacies.

Illustration.

A has bequeathed to *B* a diamond ring, valued at 500 rupees, and to *C* a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to *A*, and rupees 666-10-8 to *C*⁴.

291. For the purpose of abatement, a legacy for life, a sum appropriated by the Will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies⁵.

Legacies treated as general for purpose of abatement.

¹ Act V of 1881, sec. 107. Sec. 291, *infra*, shows that for the purpose of abatement life-interests and annuities are to be treated as general legacies.

² Act V of 1881, sec. 108.

³ Act V of 1881, sec. 109.

⁴ Act V of 1881, sec. 110.

⁵ Act V of 1881, sec. 111.

PART XXXV.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

Executor's
assent
necessary
to complete
legatee's
title.

292. The assent of the executor is necessary to complete a legatee's title to his legacy.

Illustrations.

(a) *A* by his Will bequeaths to *B* his Government paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities, nor *B* a right to take possession of them, without the assent of the executor.

(b) *A* by his Will has bequeathed to *C* his house in Calcutta in the tenancy of *B*. *C* is not entitled to receive the rents without the assent of the executor¹.

Effect of
executor's
assent to
specific
legacy.

293. The assent of the executor to a specific bequest shall be sufficient to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way. This assent may be verbal, and it may be either express or implied from the conduct of the executor.

Illustrations.

(a) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied².

(b) The interest of a fund is directed by the Will to be applied for the maintenance of the legatee during his minority. The

¹ Act V of 1881, sec. 112. So if *A* by his will forgives a debt due to him from *B*. A debt so forgiven is regarded as a legacy, and *B* must pay the debt unless *A*'s executor assents. The rule is for the executor's protection, he being responsible to the creditors of the deceased to the ex-

tent of the whole estate. Before the assent, the legatee has an inchoate right to the legacy transmissible to his representatives in case of his death before it is paid or delivered.

² So if the executor himself buys the horse, or offers the legatee money for it.

executor commences so to apply it. This is an assent to the whole of the bequest.

(c) A bequest is made of a fund to *A*, and after him to *B*. The executor pays the interest of the fund to *A*. This is an implied assent to the bequest to *B*¹.

(d) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed².

(e) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor³. His assent may be presumed⁴.

294. The assent of an executor to a legacy may be conditional, and if the condition be one which he has a right to enforce, and it is not performed, there is no assent. Conditional assent.

Illustrations.

(a) *A* bequeaths to *B* his lands of Sultánpur, which at the date of the Will, and at the death of *A*, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that *B* shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(b) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid⁵.

295. When the executor is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person⁶, and his assent may in like manner be express or implied. Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor. Assent of executor to his own legacy.

Illustration.

An executor takes the rent of a house or the interest of

¹ For the particular estate and remainder constitute but one estate.

² Because in the absence of evidence to the contrary the executors are taken to have acted in conformity with their duty. See the Evidence Act, I of 1872, sec. 114.

³ i. e. for some considerable time and with the executor's knowledge.

⁴ Act V of 1881, sec. 113.

⁵ Act V of 1881, sec. 114. The reason

is, because the condition was such as the executor had no right to impose.

⁶ The reason is, that until the executor has examined the state of the assets, he cannot decide whether they will admit of his taking the thing bequeathed as a legacy, or whether it must not be applied in satisfaction of debts.

As to bequests to a person named as executor see *supra*, sec. 128.

Government securities bequeathed to him, and applies it to his own use. This is assent¹.

Assent of executor gives effect to legacy from testator's death.

296. The assent of the executor to a legacy gives effect to it from the death of the testator.

Illustrations.

(a) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.

(b) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to this legacy until the expiration of a year from A's death. B is entitled to interest from the death of A².

Executor not bound to pay or deliver legacies until after one year from testator's death.

297. An executor is not bound³ to pay or deliver any legacy until the expiration of one year from the testator's death⁴.

Illustration.

A by his Will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

¹ Act V of 1881, sec. 115. Other illustrations are where an executor says that he will have the legacy according to the will: or by deed reciting that he has a house by bequest assigns it: or repairs at his own expense a house bequeathed to him; or excludes a co-executor from joint occupancy of property with him, or performs a condition or trust annexed to the legacy.

If an executor-legatee renounce probate, his assent to his own legacy will be ineffectual.

² Act V of 1881, sec. 116.

³ even though the testator may have directed that the legacy be paid before the year expires, *Brooks v. Lewis*, Madd. & Geld. 358.

⁴ Act V of 1881, sec. 117; 6 All. 614, 615. During this time it is presumed that he may fully inform himself of the state of the property. Of course, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they may do so.

PART XXXVI.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

298. Where an annuity is given by the Will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event ¹. Commencement of annuity when no time fixed by Will.

299. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor think fit, be paid when due, but the executor shall not be bound to pay it till the end of the year ². When payment of annuity to be paid quarterly or monthly first falls due.

300. Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the Will authorizes the first payment to be made; and if the annuitant should die in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative ³. Dates of successive payments when first payment is to be made within given time.

¹ Act V of 1881, sec. 118. As to the interest on the arrears of an annuity, see *infra*, sec. 314.

² Act V of 1881, sec. 119.

³ Act V of 1881, sec. 120. As to the English law on the subject, see *Irvin v. Ironmonger*, 2 R. & M. 531.

PART XXXVII.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

Investment of sum bequeathed where legacy, not specific, is given for life.

301. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may, by any general rule¹ to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due².

Investment of amount of general legacy, to be paid at future time.

302. Where a general legacy is given to be paid at a future time, the executor shall invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding Section. The intermediate interest shall form part of the residue of the testator's estate³.

Procedure when no fund is charged with or appropriated to annuity.

303. Where an annuity is given and no fund is charged with its payment or appropriated by the Will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule¹ to be made from time to time, authorize or direct⁴.

Transfer to residuary legatee of amount of contingent bequest.

304. Where a bequest is contingent, the executor is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee⁵ on his giving sufficient security for the payment of the legacy if it shall become due⁶.

¹ No such rule appears to have been made by any of the High Courts (see as to Bombay, 12 Bom. H. C. 195). In the absence of such a rule the executor may safely select the securities mentioned in the Indian Trustee Act, II of 1882, sec. 20, *infra*.

² Act V of 1881, sec. 121.

³ Act V of 1881, sec. 122.

⁴ Act V of 1881, sec. 123.

⁵ if any.

⁶ Act V of 1881, sec. 124. The principle is that, the legatee being entitled to receive a *certain* sum when the contingent event happens, the legacy is not capable of being secured

305. Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in such securities as the High Court may for the time being regard as good securities, shall be converted into money and invested in such securities¹.

Investment of residue bequeathed for life, without direction to invest in particular securities.

306. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities².

Where residue bequeathed for life, with such direction.

307. Such conversion and investment as are contemplated by the two last preceding sections shall be made at such times and in such manner as the executor shall in his discretion think fit; and until such conversion and investment shall be completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market value (to be computed as of the date of the testator's death) of such part of the fund as shall not yet have been so invested³.

Time and manner of conversion and investment. Interest payable until investment.

308. Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the Will⁴ to pay it to any person on his behalf, the executor or administrator shall pay or deliver⁵ the same⁶ into the

Minor entitled to immediate payment, and no direction to pay to any one on his behalf.

by the present appropriation of any sum of stock which is always fluctuating in value, *Weber v. Weber*, 1 S. & S. 311.

¹ Act V of 1881, sec. 125. This section involves an application to the High Court in order to ascertain what it may 'for the time being regard as good securities.' As to an executor's duty to convert in the absence of any special direction in the will, see 12 Bom. H. C. 184.

² Act V of 1881, sec. 125.

³ Act V of 1881, sec. 126, sub-

stituting 'six per cent.' for 'four per cent.'

⁴ *In the will.* So in England the direction for payment to the trustee must appear on the face of the will and cannot be proved by parol evidence.

⁵ The payment or delivery need not be made till the expiration of a year from the testator's death.

⁶ i. e. the whole legacy. The executor cannot apply any part of the capital of the legacy for the child's maintenance or advancement without the sanction of the Court.

Court of the District Judge, by whom, or by whose District Delegate, the probate was or letters of administration with the Will annexed were granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards; and if the legatee be a ward of the Court of Wards the legacy shall be paid into that Court to his account; and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid; and such money when paid in shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct¹.

¹ Act V of 1881, sec. 127. Does this repeal sec. 32 of the Official Trustee's Act, XVII of 1864, where the minor or lunatic is entitled to *immediate* payment or possession? That section provides that 'if any infant or lunatic shall be entitled to any gift or legacy or residue or share thereof, it shall be lawful for the executor or administrator by whom such legacy, residue, or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, legacy or residue or

share, to pay or transfer the same to the Official Trustee appointed under this Act, provided that the leave of the High Court to make such payment shall be first obtained by motion made on petition. Any money or property paid or transferred to the Official Trustee or vested in him under this section shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee under the provisions hereof.'

PART XXXVIII.

OF THE PRODUCE AND INTEREST OF LEGACIES.

309. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death ¹.

Legatee of specific legacy entitled to produce thereof from testator's death.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(a) *A* bequeaths his flock of sheep to *B*. Between the death of *A* and delivery by his executor the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of *B*.

(b) *A* bequeaths his Government securities to *B*, but postpones the delivery of them till the death of *C*. The interest which falls due between the death of *A* and the death of *C* belongs to *B*, and must, unless he is a minor, be paid to him as it is received.

(c) The testator bequeaths all his four per cent. Government promissory notes to *A* when he shall complete the age of 18. *A*, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and *A*'s completing 18, forms part of the residue ².

310. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Residuary legatee entitled to produce of residuary fund from testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon

¹ The reason is, because a specific legacy is considered as separated from the general estate, and appropriated at the time of the testator's death.

Therefore whatever accrues upon it from the period belongs to the legatee, Wms. Exors. 1429.

² Act V of 1881, sec. 128.

the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of ¹.

Illustrations.

(a) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(b) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of ².

Interest
when no
time
fixed for
payment
of general
legacy.

311. Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death ³.

Exceptions.—(1.) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2.) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator ⁴.

(3.) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator ⁵.

Interest
when time
fixed.

312. Where a time has been fixed for the payment of a general legacy ⁶, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor ⁷ of the legatee, or has put himself in the place

¹ i.e. it falls into the residue to accumulate for the benefit of the residuary legatee, or for the executors or next of kin of the testator upon the event of the residuary legatee's death before the legacy vests in him, or for such other person as may on that contingency be named to take.

² Act V of 1881, sec. 129.

³ As the legacy is not due before the expiration of the year, no interest accrues due for delay in payment of the principal until after that period.

⁴ For a parent or a person who has put himself *in loco parentis* is under a natural obligation to provide a present as well as a future maintenance for the child.

⁵ Act V of 1881, sec. 130.

⁶ whether particular or residuary, vested or contingent.

⁷ i.e. a grandfather or great-grandfather. In England grandchildren and great-grandchildren are in such cases deemed strangers to the testator, unless he be *in loco parentis*.

of a parent of the legatee, and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum ¹ is given by the Will for maintenance ².

313. The rate of interest shall be four per cent. per annum ³. Rate of interest.

314. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the Will for making the first payment of the annuity ⁴. No interest on arrears of annuity within first year after testator's death.

315. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator ⁵. Interest on sum to be invested to produce annuity.

¹ If the sum be insufficient and the legacy be vested, the Court will allow a reasonable maintenance notwithstanding the surplus interest be directed to accumulate.

² or unless the will contains a direction to the contrary. Sec. 312 is = Act V of 1881, sec. 131.

³ Act V of 1881, sec. 132, substitut-

ing 'six per cent.' for 'four per cent.'

⁴ Act V of 1881, sec. 133. See sec. 298 (supra, p. 471).

⁵ Act V of 1881, sec. 134. Here the interest is payable as representing the annuity, which, as no time is fixed for its commencement, is considered as beginning from the testator's death (sec. 298).

PART XXXIX.

OF THE REFUNDING OF LEGACIES.

Refund of
legacy paid
under
Judge's
orders.

316. When an executor has paid a legacy under the order of a Judge, he is entitled to call upon the legatee to refund, in the event of the assets proving insufficient to pay all the legacies ¹.

No refund
if legacy
paid volun-
tarily.

317. When an executor has voluntarily paid a legacy, he cannot call upon a legatee to refund, in the event of the assets proving insufficient to pay all the legacies ².

Refund
when
legacy has
become
due on per-
formance
of condi-
tion within
further
time
allowed
under sec-
tion 124.

318. When the time prescribed by the Will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under the one hundred and twenty-fourth Section, for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount ³.

When each
legatee is
compel-
lable to
refund in
proportion.

319. When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion ⁴.

Distribu-
tion of
assets.

320. Where an executor or administrator has given such notices as would have been given by the High Court in an administration suit ⁵, for creditors and others to send in to

¹ Act V of 1881, sec. 135.

² Act V of 1881, sec. 136. See sec. 323 *infra*, 'all the legacies,' not 'all the debts'; see sec. 319.

³ Act V of 1881, sec. 137.

⁴ Act V of 1881, sec. 138.

⁵ See the Civil Procedure Code, secs. 213, 215, 215 A, and Sched. IV, nos. 105-107, 130, 131.

him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution; but nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively ¹.

321. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor was voluntary or not ².

322. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under the last preceding section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor ³.

323. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, must, before he can call on a satisfied legatee to refund, first proceed against the executor if he is solvent; but if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion ⁴.

¹ Act V of 1881, sec. 139, with slight changes. Compare in England 22 & 23 Vic. c. 35, sec. 29.

² Act V of 1881, sec. 140. Suits under this section must be brought within three years from the date of payment or distribution, see Act XV of 1877, sched. ii, art. 137, in the second volume of this work.

³ Act V of 1881, sec. 141. The distinction between the case put in this section and that put in sec. 323 is that here the second legatee has received no more than he was entitled to, and the executor is therefore the only person to be resorted to.

⁴ Act V of 1881, sec. 142. Here the legatee who has received his legacy

Limit to the refunding of one legatee to another.

324. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees, and if properly administered would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees¹.

Refunding to be without interest.

325. The refunding shall in all cases² be without interest³.

Payment of residue to residuary legatee.

326. The surplus or residue of the deceased's property after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the Will⁴.

in full has received more than he was entitled to, and the other legatees may therefore fairly call on him to refund. But they must resort, in the first place, to the executor if solvent, for he, by paying the one legacy, has admitted assets to pay all.

¹ even when a legacy has been erroneously paid to a legatee who has no farther property in the estate. But in England see *Gittins v. Steele*, 1 Swanst. 200, per Lord Eldon.

² Act V of 1881, sec. 144.

⁴ Act V of 1881, sec. 145.

³ Act V of 1881, sec. 143.

PART XL.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

327. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Liability
of executor
or adminis-
trator for
devasta-
tion.

Illustrations.

(a) The executor pays out of the estate an unfounded claim¹. He is liable to make good the loss.

(b) The deceased had a valuable lease renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(c) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss².

328. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Neglect
to get in
part of
deceased's
property.

¹ i.e. a claim which the executor is not bound to satisfy, e.g. a claim on a bond *ex turpi causa*, or a claim for the schooling, feeding, or clothing of the children of the deceased subsequently to his death. Wms. Exors. 1809.

² Act V of 1881, sec. 146. Other illustrations are:—

(d) The executor applies part of the assets to the satisfaction of his own debt to a third party; (e) he collusively sells the testator's goods at an undervalue; (f) he misapplies the assets in undue expenses at the funeral; (g) he pays debts out of their legal order to the prejudice of such as are superior, and of which he had notice; (h) he assents to or pays a legacy when there is not enough for

the creditors; (i) he surrenders the residue of a term when the land is of greater yearly value than the rent; (j) he neglects to assign the residue of a term where the rent is greater than the yearly value of the land; (k) he releases a cause of suit founded on a wrong committed within the year next before the testator's death, and causing pecuniary loss to his estate. In each of these cases he is liable to make good the loss, Wms. Exors. 1804–1806, 1809. So also an executor submitting a debt due to his testator to arbitration seems liable when the arbitrators award him less than is due. There is nothing in India corresponding to 23 & 24 Vic. c. 145, sec. 30.

Illustrations.

(a) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount¹.

(b) The executor neglects to sue for a debt till the debtor is able to plead the Act for the limitation of suits, and the debt is thereby lost to the estate. The executor is liable to make good the amount².

¹ Otherwise if the release or composition appear to be for the benefit of the estate, *Wms. Exors.* 1807, 1808. But in India executors have not as such any express power to release or compound such as is given in England by 23 & 24 Vic. c. 145, sec. 30.

² Act V of 1881, sec. 147. Other illustrations are:—

(c) The executor neglects to call in the money due on a bond to the testator, and the obligor becomes insolvent and no dividend is made on the insolvency; (d) an executor leaves an unascertained residue in his co-executor's hands, who becomes insolvent; (e) he enables a co-executor to receive money and does not enforce a debt due from him to the estate; (f) for more than a year after the testator's death he allows part of the assets to lie unproductive in the hands of a banker who fails; (g) he negligently omits to sell certain shares of the testator which were at a

premium at the time of his death, but which subsequently fell to a discount. In each of these cases the executor is liable.

If the testator have been in a partnership business the executor should wind it up as soon as possible. See *Exp. Garland*, 10 Ves. 119, per Lord Eldon, and 2 Lindley, Partnp., 4th ed., 1060.

If he carries it on he becomes personally liable to third parties as if he were a partner in his own right; and whether he is entitled to be indemnified out of the assets of the deceased depends on whether he has acted pursuant to the will of the deceased, or the directions of those beneficially interested in his estate, Lindley, *ubi supra*.

As to the liability of an executor for a devastavit by his co-executor, see *Wms. Exors.* 1828–1835, and compare the Indian Trusts Act, II of 1882, sec. 26, *infra*.

PART XLI.

Miscellaneous.

329. *Repealed by Act VII of 1870.*

330. *Repealed by Act VII of 1870.*

331. The provisions of this Act shall not apply to Intestate or Testamentary succession to the property of any Hindú¹, Muhammadan² or Buddhist³, nor shall they apply to any Will made⁴, or any intestacy occurring before the first day of January 1866. The fourth section shall not apply to any marriage contracted before the same day.

Succession to property of Hindús etc., and Wills, intestacies and marriages not affected by this Act.

332. The Governor-General of India in Council shall from time to time have power, by an order, either retrospectively from the passing of this Act, or prospectively, to exempt from the operation of the whole or any part of this Act the members of any race, sect or tribe in British India or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act,

Power to exempt from operation of Act.

¹ We see from its connection with 'Muhammadan' and 'Buddhist' that 'Hindú' is here used as a theological term, and as denoting a person professing any form of the Brahmanical religion, or religion of the Puráṇas. This would include Jains and Sikhs, as to the former of whom see L. R. 5 Ind. App. 67 (S. C. 1 All. 688); 6 ibid. 15; 10 Bom. H. C. 241, and 2 Ind. Jur. N. S. 312; and as to the latter see *Doe v. Baidam Beebee*, 2 Morl. Dig. 22. This Act, however, governs the succession in the families of Hindús converted to Christianity, and since 1 Jan. 1866 such families have not been at liberty to adhere to the Hindú law of succession, 2 Mad. 211. That 'Hindú' includes 'Jain,' see 3 All. 55. That

it does not include 'Native Christian,' see (besides 2 Mad. 211) 7 Mad. H. C. 121. That there is no power to grant probate of a Hindú's will in any case in which according to Hindú law he had no power to make a will, see 11 Suth. 413. That probate may be granted of the will of a Burmese Buddhist made after 1 Jan. 1866, see 2 Ben. A. C. 79; and now see Act V of 1881.

² whether Shía (2 Moore, I. A. Ca. 441) or Sunní.

³ This excludes the Burmese, the Tibetans in the valley of Spiti, and the Lepchas about Darjiling.

⁴ The Act apparently would not apply to a will made before 1 Jan. 1866, but revived by a codicil executed after that day.

or of the part of the Act mentioned in the order¹. The Governor-General of India in Council shall also have power from time to time to revoke such order, but not so that the revocation shall have any retrospective effect. All orders and revocations made under this Section shall be published in the Gazette of India.

¹ Under this section Native Christians in Coorg have been exempted retrospectively from the 16th March,

1865. *Gazette of India*, 25 July, 1868, Part I, p. 1094.

THE GENERAL CLAUSES ACT.

THE primary object of this law, which was suggested by the English Statutes 7 Wm. IV and 1 Vic. c. 39, and 13 & 14 Vic. c. 21, is to shorten the language of the Acts of the Governor-General in Council passed after 3rd January 1868. It also contains provisions as to the revival of statutes; the commencement and termination of time; and the application of a law to Her Majesty's successors, to deputies and subordinates of official chiefs, to successors of functionaries and corporations, and to persons duly appointed to act for absent officials. It incorporates by reference the rules of the Penal Code, and the Criminal Procedure Code as to the recovery of fines to be imposed under Acts passed after 3rd January, 1868. These provisions apply to the interpretation of all future Acts unless the subject or context requires a different construction. They were suggested by a draft entitled 'Illustrations of Rules of Construction' framed by the late Mr. Arthur Symonds, and printed in *Papers relative to the drawing of Acts of Parliament*, London, 1838, p. 77. The General Clauses Act also declares that all matters done under an enactment before its repeal shall be unaffected. It also provides that, in case of any one whose personal law permits adoption, the word 'son' shall include an adopted son, and the word 'father' an adoptive father. The latter amendment, looking to the fact that the practice of adoption prevails amongst the great bulk of the population to which the Acts of the Governor-General apply, is desirable. Had such a provision existed when the Legislative Council passed Act No. XIII of 1855—the Indian version of Lord Campbell's well-known Act—there would have been no room for the doubt which was raised, as to whether a Hindú could recover from a Railway Company damages for a wrongful act or neglect causing the death of his adoptive father. A section has also been taken from Act No. V of 1849, which provided that when any enactment declared that a duty of customs or excise was leviable on any given quantity of goods, a like duty was leviable, according to the same rate, on any greater or less quantity. Two other sections, repealed and replaced by the Evidence Act, ss. 37, 56, provided that judicial notice should be taken of the laws in force in any part of British India, and that recitals contained in

Acts of the Governor-General in Council should be *prima facie* evidence of the truth of the facts recited.

Act I of 1868 was drawn by the writer for Mr. (now Sir H. S.) Maine, and carried through the Council, in Mr. Maine's absence, by the late Right Hon. W. N. Massey. Though very incomplete, it has worked fairly well. If it were extended (as it might safely be) to unrepealed Acts passed *before* 3rd January, 1868, and to Regulations made by the Governor-General in Council under 33 Vic. c. 3, many of those Acts and Regulations might be shortened by omitting, in whole or in part, their interpretation-clauses.

Should this be done, the opportunity might be taken to insert in the new law declarations that any power conferred by an Act to make rules or issue orders may be exercised at any time after it passes, but that a rule or order so made shall not take effect until the Act comes into force: that a power to make bye-laws authorises the annexation of reasonable pecuniary penalties for their breach: that all powers conferred by an Act may be exercised from time to time as occasion requires: that any enactment or document referring to any enactment repealed shall be construed to refer to the repealing Act or the corresponding portion thereof: that every power to appoint to an office includes a power to suspend or remove the person appointed: that offences committed against, and obligations incurred under, a temporary Act may be, respectively, punished and enforced after its expiration. Definitions of the following terms, 'Collector,' 'Company,' 'District Court,' 'District Magistrate,' 'export,' 'Gazette,' 'Government Securities,' 'import,' 'Local Authority,' 'notification' and 'notified,' 'prescribed,' 'registered,' 'salary,' 'sign,' 'street,' 'value' used with reference to a suit, 'vessel,' 'steam-vessel' and 'master,' 'written,' might also be added. And declarations might be made as to the effect of preambles, marginal notes, titles of groups of sections, illustrations and schedules.

Similar local Acts are in force in the Presidency of Madras (Mad. Act I of 1867), in the Presidency of Bombay (Bombay Act X of 1866), and in the Lower Provinces (Ben. Act V of 1867). They have greatly shortened the subsequent laws of the local legislatures by which they were respectively enacted.

ACT No. I of 1868.

(Received the assent of the Governor-General on the 3rd January, 1868.)

An Act for shortening the language used in Acts of the Governor-General of India in Council and for other purposes.

WHEREAS it is expedient to shorten the language used in Preamble. Acts made by the Governor-General of India in Council, and to make certain provisions relating to such Acts; It is hereby enacted as follows :—

1. This Act may be cited as 'The General Clauses Act, Short title. 1868.'

2. In this Act and in all Acts¹ made by the Governor-General of India in Council after this Act shall have come into operation,—unless there be something repugnant in the subject or context,—

(1.) Words importing the masculine gender shall be taken Gender. to include females;

(2.) Words in the singular shall include the plural, and *vice versa*¹.

(3.) 'Person' shall include any company, or association, or 'Person. body of individuals whether incorporated or not;

(4.) 'Year' and 'month' shall respectively mean a year 'Year' and month reckoned according to the British calendar²; and 'month.'

(5.) 'Immoveable property' shall include land, benefits to 'Immove- arise out of land, and things attached to the earth, or per- able pro- perty.' manently fastened to anything attached to the earth³;

¹ But 'a pair of ponies' does not include a single pony, 5 Mad. 271.

² The phrases 'agricultural year' and 'financial year,' which occur in many Acts of the Governor-General in Council, might also here be defined.

³ The word 'immoveable' is used

by the Indian Legislature as something less technical than 'real,' and 'immoveable property' comprehends (says the P. C.) certainly all that would be real property according to English law, and possibly more. In some foreign systems of law in which

‘Moveable property.’ (6.) ‘Moveable property’ shall mean property of every description, except immoveable property;

‘Her Majesty.’ (7.) ‘Her Majesty’ shall include Her heirs and successors to the Crown;

‘British India.’ (8.) ‘British India’ shall mean the territories for the time being vested in Her Majesty by the Statute 21 & 22 Vic., cap. 106 (*An Act for the better government of India*), other than the Settlement of Prince of Wales’ Island, Singapore and Malacca;

‘Government of India.’ (9.) ‘Government of India’ shall denote the Governor-General of India in Council, or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by them or him respectively;

‘Local Government.’ (10.) ‘Local Government’ shall mean the person authorised by law to administer executive government in the part of British India in which the Act containing such expression shall operate, and shall include a Chief Commissioner;

‘High Court.’ (11.) ‘High Court’ shall mean the highest Civil Court of appeal in such part;

‘District Judge.’ (12.) ‘District Judge’ shall mean the Judge of a principal Civil Court of original jurisdiction; but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction;

‘Magistrate.’ (13.) ‘Magistrate’ shall include¹ all persons exercising

the technical division of property is into moveables and immoveables, as, e.g. the Civil Code of France, many things which the law of England would class as ‘incorporeal hereditaments’ fall within the latter category, 13 Ben. 265. That ‘incorporeal hereditaments’ are included in ‘immoveable property,’ see 7 All. 120, 124. So are the interest of a tenant in his holding, 3 All. 422; a decree creating a charge on land, 1 All. 348; a debt secured by mortgage, 9 Cal. 511, or collateral hypothecation of land, 9 Mad. 5, 9; the interest of the mortgagee under a bond hypothecating

land to him, 6 N. W. P. 129; a decree for sale of mortgaged land, 9 Bom. 64. As to what is ‘immoveable property’ by Hindú law (slaves, charges on land), see 9 Bom. H. C. 222; the office of a hereditary priest to a temple, 6 Bom. H. C., A. C. J. 137; but not a Government promissory note, 5 Suth. Civ. R. 141.

¹ The word ‘include’ here and elsewhere in this section is enumerative, not exhaustive. Accordingly, a Village Munsif in the Madras Presidency has been held to be a ‘Magistrate’ within sec. 26 of the Evidence Act, 2 Mad. 5.

all or any of the powers of a Magistrate under the Code of Criminal Procedure ;

(14.) ' Barrister ' shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland ;

(15.) ' Section ' shall denote a section of the Act in which ' Section ' the word occurs ¹ ;

(16.) ' Will ' shall include a codicil and every writing making ' Will ' a voluntary posthumous distribution of property ;

(17.) ' Oath,' ' swear ' and ' affidavit ' shall include affirmation, declaration, affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing ;

' Oath,'
' swear,'
and ' affidavit.'

(18.) ' Imprisonment ' shall mean imprisonment of either description as defined in the Indian Penal Code ;

Imprisonment.

(19.) And in the case of any one whose personal law permits adoption, ' son ' shall include an adopted son, and ' father ' an adoptive father.

' Son,'
' Father.'

3. In all Acts made by the Governor-General of India in Council after this Act shall have come into operation :—

(1.) For the purpose of reviving, either wholly or partially, a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose ² ;

Revival of
repealed
enactments.

(2.) For the purpose of excluding the first in a series of days or any other period of time, it shall be sufficient to use the word ' from ; '

Commencement of
time.

(3.) For the purpose of including the last in a series of days or any other period of time, it shall be sufficient to use the word ' to ; '

Termination of
time.

(4.) For the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully executing the duties of such office in the place of their superior, it shall be sufficient to prescribe the duty of the superior ;

Official
chiefs
and subordinates.

¹ This should be : ' Chapter ' shall denote a chapter of the Act, ' section ' a section of the Act, and ' clause ' a clause of the section, in which the word occurs.

² This should be extended so as to preclude the revival of any right, privilege, matter or thing not in force or existing when the repealing Act comes into force.

Successors. (5.) For the purpose of indicating the relation of a law to the successors of any functionaries, or of corporations having perpetual succession, it shall be sufficient to express its relation to the functionaries or corporations ; and

Substitution of functionaries. (6.) For the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, it shall be sufficient to mention the official title of the officer at present executing such functions, or that of the officer by whom the functions are commonly executed.

Duty may be taken pro rata. 4. Whenever by any Act or Regulation now in force or hereafter to be in force, any duty of customs or excise or in the nature thereof is leviable on any given quantity, by weight, measure or value, of any goods or merchandize, a like duty shall be leviable according to the same rate on any greater or less quantity.

Recovery of fines. 5. The provisions of sections 63 to 70, both inclusive, of the Indian Penal Code, and of sections 386, 387, and 389 of the Code of Criminal Procedure, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary.

Matters done under an enactment before its repeal to be unaffected. 6. The repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed¹, or any fine or penalty incurred, or any proceedings² commenced before the repealing Act shall have come into operation³.

¹ See 2 Cal. 225, where, however, Act I of 1868 did not apply.

² A suit is a judicial proceeding, and the words 'any proceedings' include all proceedings in any suit from the date of its institution to its final disposal ; and therefore include proceedings in appeal, 6 Bom. H. C., A. C. J. 169 ; 3 Cal. 674, and also specific proceedings taken in execution of a decree, 3 Cal. 679. See, too, 3 Cal. 727.

³ 1 All. 668 ; 2 All. 786, 851 ; 4 Cal. 538 ; 6 Mad. 338. The general rule is that a repealed statute cannot be

acted on after it is repealed ; but that, with regard to all matters that have taken place under it before its repeal, they remain valid, *R. v. Denton*, 21 L. J. M. C. 208, cited 8 Bom. 345.

This section is 'not to be held to govern all the remotest ministerial consequences of a suit arising on applications made years afterwards according to the procedure in force at its institution, but only to bring under the same law such series of proceedings as group themselves naturally together, as, e.g. those on a particular application for execution,' 7 Bom. 463.

INTRODUCTION TO THE CONTRACT ACT.

THE Indian Contract Act, 1872, endeavours to codify—that is to say, arrange clearly and systematically—the chief rules relating to the formation, ratification, and discharge of all agreements enforceable by law, made between two or more persons, by which rights are acquired by one or more of them to acts or forbearances on the part of the other or others¹. 'It also deals specially with the following classes of those agreements, viz.: Sale of Goods; Indemnity and Guarantee; Bailment, including Pledge; Warranty; Agency and private Partnership (public partnerships are dealt with by the Indian Companies Act, 1882). It deals, lastly, with the *quasi*-contracts implied when *A* pays something which *B* ought to pay, or *B* receives something which *A* ought to receive. The obligation arising from Breach of Contract is partially dealt with by the section of the Contract Act relating to compensation. The law relating to the Specific Performance and Rescission of contracts was then codified by the Specific Relief Act, 1877, chapters II and IV. Then came the codification of the law of Negotiable Instruments (Act XXVI of 1881) which deals with the most important branch of the law relating to the assignment of contractual rights. Lastly, the rules relating to the assignment by operation of law of obligations on the transfer of land; to Sale, Mortgage and Lease of Immovables; to Exchange and Gift of every kind of property, and to the assignment of contractual rights not comprised in Act XXVI of 1881, were codified by the Transfer of Property Act, 1882, chapters III, IV, V and VI.

It thus appears that, with the exceptions of the rules relating to the Interpretation of Contracts, of those relating to the special contracts of Carriage, Master and Servant, Bottomry, Respondentia, and Insurance, the Indian Legislature has codified, more or less completely, the law relating to every important kind of agreement; and draft codes relating to most of the excepted subjects are now in the Legislative Department of the Government of India.

¹ See Anson, *Law of Contract*, 4th ed., p. 9.

acceptance is posted after but reaches the acceptor simultaneously with the acceptance, no contract seems to be formed¹.

A contract is voidable at the option of the party disadvantaged by it when his consent has been caused by 'coercion,' 'undue influence,' 'fraud' or 'misrepresentation.'

'Coercion' is defined in the Contract Act, sec. 15, so as to include cases when the person coerced and the person coercing are strangers to the contract and unconnected with either of the parties.

'Undue influence' is defined in sec. 16. It consists in acts which, though not fraudulent, amount to an abuse of the power which circumstances have given to the will of one individual over that of another².

'Fraud' is defined in sec. 17. As to this, it is to be remarked that the rhetorical phrases of a vendor are not necessarily fraudulent; that the contract is not voidable when the fraud did not cause the consent of the party on whom it was practised³; or when the fraud is fraudulent silence and the party deceived by it could, with ordinary diligence, have discovered the truth⁴; and that for the purpose of rendering the contract voidable the fraud of an agent is deemed the fraud of his principal, and fraud practised on an agent is deemed to be practised on his principal⁵.

'Misrepresentation' is defined by sec. 19. Here, too, the contract is not voidable when the misrepresentation did not cause the consent of the party to whom it was made or when the party to whom the misrepresentation was made could, with ordinary diligence, have discovered the truth. But nothing is said of misrepresentation by or to an agent.

The expression of an agreement may be by words or signs, or merely by a course of conduct, in which last case it is properly called an 'implied contract'. Under the Contract Act, sec. 9, when a proposal or acceptance is made by signs the promise is said to be 'implied.' But this is probably owing to a slip in drafting. The expression must be made by the parties to one another, but of course they may communicate by letter, telegraph, or agent.

¹ *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190, cited by Holland, p. 220, note, where one lady wrote to another to engage a servant, and afterwards wrote not to do so, and the two letters were delivered, through the post

office simultaneously, to the servant.

² Holland, p. 221.

³ Contract Act, sec. 19, Expl.

⁴ *Ibid.* sec. 19, exception.

⁵ *Ibid.* sec. 17.

⁶ Holland, 222.

The appointment of an agent requires no formality, and may be Contract implied from the acts of the principal¹, but not from mere necessity², by Agent. A person who at the time of forming the contract had no authority to act for another may be retrospectively made his agent by subsequent ratification³. The authority of a special agent is limited to the doing of the particular act for which he is appointed and of every lawful thing necessary in order to do such act⁴. The authority of a general agent—i.e. an agent who has authority to carry on a business⁵, or whose authority is defined by his business⁶—cannot be limited by private prohibition from the principal, unless of course such prohibition is known to the party dealing with the agent. A contract made by an agent being the contract of his principal the agent ~~alone~~^{not} can sue or be sued upon it. But to this rule there are three exceptions:—

a. Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad (i.e. out of British India).

b. When the agent does not disclose the name of his principal.

c. When the principal, though disclosed, cannot be sued.

Where a man fraudulently represents that he is the agent of another, whereby a third party suffers loss, that party may sue the pretended agent either in tort⁷ or on an implied warranty of his authority to bind his principal⁸.

3. The matter agreed upon⁹ must be possible. This is provided for in the Contract Act, s. 56. It makes no difference whether or no the impossibility is known to the parties; and a thing is said to be impossible not only *quod natura fieri non concedit* (as in the case of an agreement to discover treasure by magic), but also if it be practically out of the question because it can only be accomplished at an unreasonable cost, or imports to have a legal effect unknown to the law¹⁰. If the thing is possible at the date of the contract but afterwards becomes impossible, the contract becomes void¹¹.

¹ Contract Act, secs. 186, 187. As to implied agency in case of an English wife, see *Jolly v. Rees*, 15 C. B. N. S. 628, and *Debenham v. Mellon*, L. R. 6 App. Cas. 24. In the case of a Hindû wife, see 3 All. 122 and 1 Mad. H. C. 375.

² 3 Ex. 268, where a railway-company was held not to be liable for the fees of a surgeon who had been called in by one of their station-masters to attend to the sufferers from an accident.

³ Contract Act, sec. 196.

⁴ Ibid. sec. 188.

⁵ Ibid. sec. 188, par. 2.

⁶ as in the case of factors, brokers, and partners.

⁷ *Randell v. Trimen*, 18 C. B. 786.

⁸ *Collen v. Wright*, 7 E. & B. 301.

⁹ See 5 All. 562 for a case of an agreement too uncertain to be enforced.

¹⁰ Holland, p. 224.

¹¹ Contract Act, sec. 56.

The matter agreed on must be lawful, and according to the Contract Act, s. 23, the object of an agreement is lawful unless it is (a) 'forbidden by law'¹, or (b) 'of such a nature that if permitted it would defeat the provisions of any law,' or (c) 'fraudulent,' or (d) injurious 'to the person or property of another,' or (e) regarded by the Court as 'immoral or opposed to public policy.'

The immorality here referred to is, no doubt, contravention of what is now deemed morality by civilised persons. Thus, the trade of prostitution is recognised and legalised by Hindú law²; but our Courts in India would certainly refuse to enforce an agreement made to clothe or lodge a woman for the purpose of enabling her to carry on that trade.

The agreement must purport to produce a legally binding result. Thus, to quote Prof. Holland, the acceptance of an invitation to dinner, or an engagement to take a walking tour with a friend in Switzerland are no contracts. So when A accepts in jest of a promise made in jest by B to pay A a fabulous amount on the occurrence of a specified event.

The agreement must be such as produces a binding result upon the mutual relations of the parties. Thus, to use Prof. Holland's illustrations, the agreement of a bench of judges as to the view to be taken of a particular case, or the resolution of a board of directors as to the action to be entered upon by their company, is not a contract.

Formalities.

4. Lastly, there must in every case be certain formalities, or lawful consideration, or both. Formalities such as writing, signature, attestation, registration, delivery, are required in the following (amongst other) cases:—

agreement without consideration made on account of natural affection between near relatives (writing and registration)³:

promise to pay a time-barred debt (writing and signature) by the promisor or his agent)⁴:

sale of tangible immoveable property worth Rs. 100 and upwards (registered instrument)⁵:

sale of such property worth less than Rs. 100 (registered instrument or delivery)⁶:

¹ That is, apparently, 'legislative enactment.' Section 23 therefore repeals the Muhammadan law that a sale of pork or wine is void, Hidáyah, ii. 429.

² 2 Mad. H. C. 78, per Holloway J.

³ Contract Act, sec. 25, cl. (1).

⁴ Ibid. cl. (3).

⁵ Act IV of 1882, sec. 54.

⁶ Ibid.

Mortgage securing Rs. 100 and upwards (registered instrument signed and attested):

Mortgage securing less than Rs. 100 (instrument signed and attested, or delivery):

The contracts entered into by those who issue, endorse or accept negotiable instruments must by the nature of the case be in writing. Contracts entered into by companies under the Indian Companies Act are regulated by Act VI of 1882, secs. 67, 72.

Even when formalities in the embodiment of contracts are at the option of the parties, there may be a concluded binding contract, although there is an intention to put its terms into a more formal shape¹.

The statutory rules as to consideration (*causa*) are contained in the Contract Act, sec. 2, cl. (d), 10, 23-25. It is thus defined: *Consideration.* 'When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.'

It would seem from this that in India the consideration need have no value, and, accordingly, that a promise by A to perform an already existing legal duty, e.g. to give true evidence in a civil suit², not to evade process, to pay a debt³, or not to commit a specified crime, is 'consideration' sufficient to support a contract with B if the promise be made at the desire of B. This result was certainly not intended by the framers of the Act, who were English lawyers, familiar with the doctrine that a consideration, however inadequate, must have some value, that, in other words, the party giving it thereby undertakes some burden, or loses something, which in contemplation of law may be of value.

The 'act, abstinence or promise' must be 'lawful' (sec. 10), and it is 'lawful' unless it is 'forbidden by law'; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy (sec. 23).

¹ 8 Mad. H. C. 5, following *Fowle v. Freeman*, 9 Ves. 351. So 3 All. 469.

² 4 Mad. H. C. 7, where the Court (in 1868) held that an agreement by A to pay money to B in consideration of B's giving evidence on behalf of A could not be enforced, for here the agreement is either for true evidence, and then

there is no consideration, or for favourable evidence, either true or false, and then the consideration is vicious.

³ See 7 Bom. H. C., O. C. J. 9, where (in 1870) a promissory note payable on demand given for interest due on a mortgage deed was held void for want of consideration,

Where the consideration is unconscionable the Court will refuse to enforce the agreement¹.

Operation
of contract.

Assign-
ment of
contractual
rights and
liabilities.

The rights and liabilities resulting from a contract depend in each case on the special character of the contract, and will be noticed infra. Such rights may be assigned either by act of parties or by operation of law, but the liabilities can only be assigned by operation of law. In other words, a man cannot by act of parties be compelled to accept performance of his contract from one who was not originally a party to it².

The English common law rule as to the non-assignability of things in action has never been in force in India. The Indian Courts have always followed the rule of Equity permitting an assignment of the rights which a man possesses under a contract (whenever that contract is not for exclusively personal services), and permitting the assignee to sue in his own name. Here the English agrees perfectly with the Hindú law³. Statutory rules on this subject are contained in the Transfer of Property Act, chap. viii, entitled 'Of Transfers of Actionable Claims⁴.' No transfer of any debt has any operation against the debtor until express notice of the transfer is given to him unless he is a party to, or otherwise aware of, such transfer. Such notice must be in writing signed by the transferor or his agent. On receiving the notice, the debtor must give effect to the transfer. Where a debt is sold the debtor is discharged by paying the buyer the price, the expenses of the sale, and interest on the price from the day that the buyer paid it. The transferee takes subject to all the liabilities to which the transferor was subject in respect of the debt at the date of the transfer—in other words, the transferor cannot give a better title than he has got. The Indian differs from the English law⁵ on the subject; first, in not requiring the assignment to be absolute; secondly, though the *notice* must be in writing, the *assignment* may in India be by word of mouth, except in the case of a decree⁶; in England it must always be in writing: thirdly, in India no officer connected with a court of justice can buy any actionable claim falling within its

¹ 1 Mad. 349.

² Anson, p. 219. There are two exceptions; one where *A* undertakes to do for *B* work which needs no special skill and it does not appear that *A* has been selected with reference to any personal qualification. In such cases the maxim *Qui facit per alium facit per se* applies, *British*

Waggon Co. v. Lea, 5 Q. B. D. 149; see p. 154. The other is in the case of obligations attached to land.

³ 1 Mad. H. C. 150.

⁴ This chapter does not apply to negotiable instruments, s. 139.

⁵ 36 & 37 Vic. c. 66, sec. 25, subsec. 6.

⁶ Act XIV of 1882, sec. 232.

jurisdiction¹. Both in England and in India the assignment operates without the consent of the party liable².

By Act V of 1866, sec. 15, every assignee of a policy of marine Policies, insurance or of fire insurance in whom the property in the subject insured is absolutely vested at the date of the assignment has the right to sue as if the contract contained in the policy had been made with himself.

Shares in Companies are assignable under the Companies Act Shares, VI of 1882³. No Company under that Act can buy its own stock, shares⁴. Shares and stock in guaranteed railways are transfer- debentures and able under 30 & 36 Vic. c. 43. Debentures issued by the Secretary coupons. of State in Council and coupons for interest annexed thereto are transferable by delivery⁵.

The benefit of the promises evidenced by negotiable instruments Negotiable may be assigned by the promisee, and enforced by the assignee, instru- without previous notice to the promisor, and without the risk of ments. being met by defences which would have been good against the assignor. The law on this subject is contained in the Negotiable Instruments Act, printed in this volume, next after the Contract Act.

Contractual rights and liabilities are now assigned in India by Assign- operation of law only in case of death, insolvency, and mortgage, ment by lease, or exchange of interests in immoveable property. Marriage, operation of law. which once transferred to the husband certain rights and liabilities of the wife, has had no such effect since 1 January 1866.

The assignment in case of death to an executor or administrator has been already considered.

The assignment in case of insolvency to the trustee or assignee of the insolvent's rights and liabilities is now regulated by the Code of Civil Procedure and (in the Presidency Towns) also by 11 & 12 Vic. c. 21.

The assignment in case of a sale, mortgage, or lease of immoveable property is dealt with by the Transfer of Property Act, secs. 40, 49, 55, cl. (2), 65, 108, cl. (c), 109. These provisions are, shortly, as follows:—

Sec. 40. Where *A* transfers land to *B*, and *C* has for the more beneficial enjoyment of his own land and independently of any interest in the land transferred or of any easement thereon, a right to restrain the enjoyment of such land; or where *C* is en-

¹ Act IV of 1882, sec. 136.

² *Brice v. Bannister*, 3 Q. B. D. 956.

³ Sec. 29, and First Sched., Table

⁴ *Ibid.*, sec. 249.

⁵ See 42 & 43 Vic. c. 60, sec. 3; 43

Vic. c. 10, sec. 3.

A, secs. 8-11.

titled to the benefit of an obligation arising out of contract and annexed to the ownership of the land transferred, but not amounting to an interest therein or easement thereon: such right or obligation may be enforced against *B* if *B* has notice thereof or if the transfer to him is gratuitous¹.

Sec. 49. Where a house insured against damage by fire is transferred by *A* to *B*, then *B*, in case of such damage, may, in the absence of a contract to the contrary, require the money received under the policy to be applied in reinstating the house.

Sec. 55, cl. 2. The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer subsists and that he has power to transfer it; and the benefit of this contract is annexed to the interest of the transferee as such, and may be enforced by every one in whom that interest is from time to time vested.

Sec. 65. A mortgagor shall be deemed to contract with the mortgagee (a) that the interest mortgaged subsists and that the mortgagee has power to mortgage it; (b) that the mortgagor will defend his own title; (c) that the mortgagor, so long as the mortgagee is out of possession, will pay the public charges due in respect of the property; (d) where the property is a lease for years, that the rent and the conditions and contracts binding on the lessee have been and will be paid, performed and observed; (e) where the mortgage is a second encumbrance, that the mortgagor will pay the interest and discharge the principal due on the prior incumbrance. The benefit of these contracts is annexed to the interest of the mortgagee as such, and may be enforced by every one in whom that interest is from time to time vested.

Sec. 108, cl. (c). A lessor is deemed to contract with the lessee that if the latter pays the rent and performs the lessee's contracts he may hold the property during the term without interruption. The benefit of this contract is annexed to the lessee's interest as such, and may be enforced by every one in whom that interest is from time to time vested.

Sec. 109. If a lessor transfers the property leased, the transferee has all the rights (except as to arrears of rent due before the transfer) and, if the lessee so elects, is subject to all the liabilities, of the lessor as to the property transferred so long as he is the owner.

Interpre-
tation of
contract.

Rules relating to the way in which the terms of a contract may

¹ *Tulk v. Moxhay*, 2 Phill. 774.

be proved, and how far, when shewn to exist in writing, they may be modified by extrinsic evidence, will be found in the Evidence Act, secs. 91-99, 144. The other rules relating to the interpretation of instruments *inter vivos* have not been codified. The Indian legislature might usefully adapt and enact many of those in Messrs. Elphinstone, Norton and Clark's recent work on the subject¹, just as in the Succession Act it has adapted and enacted many of those in Mr. Hawkins' work on the construction of Wills.

DISCHARGE OF CONTRACT.

In England a contract may be discharged in the following six Discharge modes, the first, third, fourth, fifth and sixth are thus stated by of contract. Sir W. R. Anson²:—

(a) It may be discharged by the same process which created it, mutual agreement.

(β) It may be discharged by the coming into existence of circumstances under which the parties originally agreed that the contract should determine, in other words, by condition subsequent.

(γ) It may be performed; and all the duties undertaken by either party may be thereby fulfilled, and all the rights satisfied.

(δ) It may be broken; upon this a new obligation connects the parties, a right of action possessed by one against the other.

(ε) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations.

(ζ) It may be discharged by the operation of certain rules of law upon certain sets of circumstances, to be hereafter mentioned.

The rules as to these six modes, which have been established in India by the legislature or the Courts, will now be shortly noticed.

(a). Discharge by Agreement. This may be—(1) waiver, Mutual substituted agreement, (3) alteration of terms. agreement.

1. Waiver. 'If the parties to a contract agree ... to rescind ... it, the original contract need not be performed³.' Such agreements are subject to the rule, which governs all contracts, with regard to consideration⁴. Here the consideration for the promise of each

¹ *Rules for the Interpretation of Deeds, with a Glossary*, London, 1885.

Contract, 4th ed., Oxford, 1886, p. 257.

² *Contract Act*, sec. 62.

³ *Principles of the English Law of*

⁴ *Ibid.*, sec. 25.

party is the abandonment by the other of his rights under the contract. There is in England an exception by the law merchant in the case of bills of exchange and promissory notes. The holder's rights may be waived and discharged without any consideration for their waiver¹. But it seems that in India the rule has been (unintentionally) repealed by the Contract Act².

As to evidence of waiver, see 7 Mad. H. C. 263.

As no special validity is attached in India to a contract under seal, it would seem that such a contract may be discharged by simple writing or even by word of mouth.

Substi-
tuted
agreement.

2. Substituted contract. This is provided for by the Contract Act, sec. 62. The consideration for the new contract is the change of rights and liabilities and consequent extinction of those which before existed. Mere postponement of performance does not discharge a contract³. And of course the mere fact that one party alleges that a new contract has been substituted for the old one does not of itself extinguish the contract, even as against that party, 8 Cal. 926.

Alteration.

3. Alteration of terms. Alteration by agreement of parties discharges a contract, (a) when what is to be done under it is so far changed as to be inconsistent with it⁴, and (b) when a new party is substituted for a previous one by agreement of all three. Illustration (b) to sec. 62 illustrates the first of these modes of discharge: illustration (a) the second. The agreement of the three parties may of course be implied from a course of dealing—as where a customer continues to bank with a firm after he has had notice of the retirement of one of the partners⁵.

When the obligee of a bond, which did not require attestation, got an attesting signature added to it by a man who had not in fact witnessed the execution, the High Court of Bombay held this to be a material alteration⁶, for it increased the apparent evidence of the genuineness of the bond.

Condition
subse-
quent.

(β) Condition subsequent. The parties to a contract may

¹ *Foster v. Dawber*, 6 Exch. 839, 851. The matter should have been expressly provided for in the Negotiable Instruments Act, 1881, sec. 82, cl. (b).

² sec. 62.

³ Contract Act, sec. 63.

⁴ In case of a contract in writing, the alteration must be something which appears to be attested by the signature, or something which alters the character of the instrument. Not

mere endorsements, marginal observations and the like, 3 Cal. 220, per Kennedy J.

⁵ *Hart v. Alexander*, 2 M. & W. 484.

⁶ 7 Bom. 418, following *Suffell v. Bank of England*, L. R. 9 Q. B. D. 555. See also 4 All. 62, where a hypothecation bond was fraudulently altered.

agree that the contract shall become void, (1) when a specified term is not fulfilled, (2) when a particular event occurs, (3) when one of them exercises an option to determine the contract. The commonest case of this is a bond, i.e. a promise subject to or defeasible upon a condition expressed in the bond. So where a common carrier agrees to take goods safely to their destination or indemnify the owner for their loss or injury, there is an implied term that he shall be exonerated by 'act of God' and of the Queen's enemies, and if the risk contemplated occurs the carrier is exonerated.

If *A* agrees to sell and *B* to buy a certain house subject to the approval of the title by *B*'s attorneys, and the attorneys disapprove the title, *A* may rescind the contract². And the contract may be rescinded even when the happening of the condition is at the will of the party making it³.

The commonest case of the determination of a contract by notice is that of master and domestic servant.

(7) Discharge by Performance. Of this the commonest forms are payment and tender. Payment is defined as the performance either of an original or substituted contract by the delivery of money or of a negotiable instrument conferring the right to receive money. In this last event the payee may have taken the instrument in discharge of his right absolutely or subject to a condition that if payment be not made when the instrument falls due the parties revert to their original rights⁴. Tender is an attempted performance. The Indian law on this subject is contained in the Contract Act, sec. 38, which declares that where the promisor makes at a proper time and place an unconditional offer to perform his promise, and the offer is not accepted, he is not responsible for non-performance; provided that the promisee has a reasonable opportunity of ascertaining (a) that the promisor is able and willing there and then to perform his promise, and (b) if the promise is to deliver something, that the thing offered is that which the promisor is bound to deliver. The distinction drawn in England between tender by delivery⁵ and tender by payment⁶ is not recognised by the Indian Act. In India therefore, a debtor whose tender of

¹ i.e. such a natural occurrence as under the circumstances could not have been prevented by any reasonable precaution; see *Nugent v. Smith*, 1 C. P. D. 441, per Mellish J.

² 8 Cal. 856.

³ 5 Mad. 173. The rule of the Civil Law, 'Nulla promissio potest

consistere, quae ex voluntate promittentis statum capit,' does not apply to Indian agreements; *ibid.*, per Innes Offg. C. J.

⁴ Anson, 273, 274.

⁵ *Startup v. Macdonald*, 6 M. & G. 593.

⁶ *Dixon v. Clarke*, 5 C. B. 376.

money is refused need not aver in a suit against him that he is ready and willing to pay the debt, nor need he pay the money into court¹.

In England a tender of money need not necessarily be of the exact sum due, but of such a sum as that the creditor can take exactly what is due without being called upon to give change. The Indian Act is silent on this point. No doubt the English rule would be followed.

**Legal
tender.**

Legal tender, as regards coinage and currency notes, is regulated by the Indian Coinage Act, XXIII of 1870, secs. 12, 13, 14, and the Indian Paper Currency Act, XX of 1882, sec. 16. No gold coin is a legal tender in payment or on account. The rupee and half-rupee are a legal tender, provided that the coin has not lost more than two per cent. in weight: provided also that it has not been clipped or filed or defaced or diminished otherwise than by use. The quarter rupee and eighth of a rupee are legal tender only for the fractions of a rupee, subject to the second of the above provisions. The (copper) double pice is a legal tender for the 32nd part of a rupee or half an anna, the (copper) pice for the 64th of a rupee, or fourth of an anna: the half pice for the 128th of a rupee or eighth of an anna: the pie for the 192nd part of a rupee or twelfth of an anna. But none of these copper coins is a legal tender except for the fractions of a rupee. Within any of the Circles of Issue established under Act XX of 1882, a currency note issued from any town in that circle is a legal tender for the amount expressed in that note in payment or on account of (a) any claim, to the amount of five rupees and upwards, due to the Government of India, and (b) any sum of five rupees and upwards, due by the Government of India or by any body corporate or person in British India.

Breach.

(d) Discharge of Contract by Breach. The Indian law on this subject is contained in the Contract Act, secs. 39, 51, 53, 54 and 55.

Sec. 39 deals with the two cases in which a party to a contract before, at, or after the time fixed for its performance (a) renounces any of his liabilities under it, and (b) by his own act makes it impossible that he should fulfil any of them. In either case the promisee may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance. It seems that under this section a partial failure to perform renders the whole contract voidable, even though the failure is such that damages will properly compensate for it².

¹ Bullen and Leake, 3rd ed. 694.

² But see contra, 4 Cal. 255-258, per Garth C. J.

Sect. 51 declares that, where a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Sect. 53 declares that when a contract contains reciprocal promises and one party prevents the other from performing his promise the contract becomes voidable at the option of the party so prevented.

Sect. 54 mentions the case of a contract consisting of reciprocal promises such that one of them cannot be performed till the other has been performed and the maker of the latter promise fails to perform it. In such case, the Act means, though it does not say so, that the maker of the former promise may rescind the contract.

Sect. 55 declares that where time is of the essence of a contract to do a thing at or before a specified time, failure to do the thing at or before the specified time enables the injured party to rescind the contract. As to terms respecting time, the Indian Courts have always followed the English Courts of Equity¹, and endeavoured to ascertain whether in fact the performance of the contract was meant to depend upon A's promise being fulfilled to the day, or whether a day was named in order to secure performance within a reasonable time. Of course the parties may expressly make time of the essence of the contract²; and where the matter of the contract is required for immediate use, or is of a terminable or fluctuating character or value³, time is essential.

When a contract is broken, the person injured by the breach has two remedies, damages for the loss he has sustained, and specific performance of the contract. Remedies for breach.

The rules as to damages are contained in the Contract Act, secs. 73, 74. They are four:—

1. The loss must either have 'naturally' arisen in the usual course of things for such breach, or been a loss which the parties knew, when they made the contract, to be likely to result from the breach:

2. The loss must not be remote or indirect:

3. In estimating the loss, the means which existed of remedying the inconvenience caused by the breach must be taken into account.

4. If a sum is named in the contract as the amount to be paid in case of the breach, the person injured is entitled, whether or not

¹ There is now in England no distinction in this respect between the rules of law and equity, 36 & 37 Vic. c. 66, sec. 25, sub-sec. 7.

² *Parkin v. Thorold*, 16 Beav. 59.

³ *Macbryde v. Weekes*, 22 Beav. 533. See Leake, *Contracts*, 448.

actual loss is caused by the breach, to reasonable compensation not exceeding the amount so named. To this the case of a bond for the performance of a public duty is an exception. This rule abolishes the English distinction between penalty and liquidated damages.

We may add the rule that damages in a suit for breach of contract are by way of compensation and not of punishment. To this there is an exception in the case of a suit for breach of promise of marriage¹.

Specific
perform-
ance.

The rules as to the other remedy—specific performance—are contained in the Specific Relief Act, with which this volume ends, and will be considered when we come to deal with that enactment.

The right of action arising from a breach of contract can only be discharged (a) by the consent of parties, (b) by the judgment of a court of competent jurisdiction, or (c) by lapse of time².

Release.

Discharge by consent of parties takes place by Release, as to which the only provision in the Contract Act is sec. 44, which declares that where two persons have made a joint promise, a release of one of the joint promisors by the promisee does not discharge the other. As Indian law knows nothing of promises under seal, there must apparently, in India, be consideration for the promise of the party entitled to sue, except perhaps in the case of bills of exchange and promissory notes. The Contract Act is silent as to Accord and Satisfaction.

Decree.

The decree of a court of competent jurisdiction in the plaintiff's favour discharges the right of action arising from breach of contract. The right is thereby merged in the form of obligation, unfortunately called in English law a 'contract of record'.³ This obligation is discharged either by satisfaction obtained by the decree-holder from the property of his debtor by the process of execution, or by payment of the judgment debt. In the latter case the decree-holder is required to certify the payment to the Court whose duty it is to execute the decree. If he fails to do so, the judgment debtor may procure the payment to be recorded⁴.

Limitation.

Lapse of time. The remedies for the violation of rights arising from contract is barred after a certain lapse of time, though, except in cases of immoveable property, the rights are not extinguished. The law on this subject will be found in the Limitation Act

¹ *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408, 410, 411.

² Anson, 314.

³ As Sir W. Anson remarks (pp. 7, 8), 'the phrase is unfortunate because

it suggests that an obligation springs from Agreement which is really imposed on the parties *ab extra*.'

⁴ Code of Civil Procedure, sec. 258.

printed in the second volume of this work.' There, too, will be found mentioned the disabilities which suspend the operation of that Act, and the rules as to the revival of the right of action by acknowledgment or part-payment.

(e) Impossibility of performance. The Indian law as to the discharge of a contract by physical or legal impossibility arising after its formation is contained in the Contract Act, secs. 32, 34, 56. A contingent contract (i.e. a contract to do or forbear some act if some collateral event does or does not happen) becomes void if the event becomes impossible. The illustration of this is: 'A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.' If the event is the way in which a person will act at an unspecified time, the event shall be deemed to become impossible when he 'does anything which renders it impossible that he should so act within any definite time or otherwise than under further contingencies.' The illustration is: 'A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B¹.' Lastly, 'A contract to do an act, which after the contract is made becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful².' In connection with these general provisions may be read the special rules in the Transfer of Property Act, secs. 68 and 108, which apply when immoveable property mortgaged or leased is during the continuance of the mortgage or lease wholly or partially destroyed from no default of either party.

In England subsequent impossibility, whether or no it originates in the default of the promisor, does not excuse from performance, except in the following cases: legal impossibility arising from a change in the law of England; destruction of the subject-matter of the contract from no default of either party; and where the contract is to render personal service, the death or incapacitating illness of the promisor. This last case probably comes within the second paragraph of sec. 56 of the Indian Contract Act.

Where a party by his own act renders the contract impossible of performance, the other party is discharged and may at once sue for compensation. If, for example, A promises to assign to B within seven years from the date of the promise all his interest in

¹ Otherwise in England, *Randal v. Payne*, 1 Bro. C. C. 55.

Here 'unlawful' probably means 'unlawful owing to a change in the law of British India.'

² Contract Act, sec. 56, par. 2.

a lease, and before the end of seven years *A* assigns his whole interest in the lease to *C*, *B* may sue *A* at once. It matters not whether the impossibility is created before performance is due¹ or in the course of performance². This form of discharge is not noticed by the Contract Act.

Operation
of law.

(*c*) Contracts, lastly, may be discharged by operation of law, as in the case of merger, alteration, or insolvency.

Merger.

As in India a deed has no higher efficacy than a simple contract, the operation of merger is far more limited in India than in England³. A decree, as we have seen, extinguishes by merger the right of action arising from breach; and when the owner of a charge on immoveable property buys or otherwise becomes absolutely entitled to that property, the charge is extinguished, unless he declares that it shall continue to subsist, or such continuance would be for his benefit⁴.

So if a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished⁵.

Alteration.

For a contract in writing to be discharged by alteration without consent, the alteration must be (1) intentionally made by or on behalf of one of the parties, (2) made without the consent of the other party, and (3) made in a material part.

The Contract Act contains no provision as to these matters. As to the effect of material alterations of negotiable instruments, see Act XXVI of 1881, sec. 87 *infra*.

Insolvency.

The statutory release of an insolvent from liability in respect of debts is provided for by the Code of Civil Procedure, secs. 357, 358, and (in the Presidency Towns) by 11 & 12 Vic. c. 21, secs. 59, 60, 61.

Special
contracts.

Having thus noticed the chief rules in force in India as to Contract in general, we may now proceed to consider some of the special kinds of contracts.

The following remarks are arranged according to the classification proposed by Prof. Holland, *Jurisprudence*, pp. 233, 250⁶. According to him all contracts are either principal or accessory.

¹ *Lovelock v. Franklyn*, 8 Q. B. 371.

² *Planché v. Colburn*, 8 Bing. 14.

³ As to merger in the Mufassal, see 10 Suth. Civ. R. 15; 11 Suth. Civ. R. 487. As to the effect of a mortgagee's purchase of an equity of redemption, see 14 Suth. Civ. R. 491; 11 Bom. H. C. 41; 7 Mad. H. C. 229; 6 Bom. 561; 2 All. 826; and in the

P. C., 9 Cal. 961.

⁴ Act IV of 1882, sec. 101.

⁵ Act XXVI of 1881, sec. 90.

⁶ I have added under the sub-head of 'Alienation' a fourth species, Assignment of contractual rights. I have also placed under Principal Contracts a fourth head relating to contracts to create a trust.

I. *Principal Contracts* are those whose object is—

- | | | |
|-----------------------------|---------------------------------|--------------------------------------|
| 1. Alienation . . . | { | a. Gift. |
| | | b. Exchange. |
| | | c. Sale. |
| | | d. Assignment of contractual rights. |
| 2. Permissive use . | { | a. Loan for consumption. |
| | | b. Loan for use. |
| | | c. Letting for hire. |
| 3. Marriage. | | |
| 4. The creation of a Trust. | | |
| | { | a. Deposit. |
| | | b. Work on Materials. |
| | | c. Carriage { a. by land. |
| | | { b. by water. |
| 5. Service . . . | | d. Professional Service { a. legal. |
| | | { b. medical. |
| | | e. Master and Servant. |
| | | f. Master and Apprentice. |
| | | g. Agency. |
| | | h. Partnership. |
| 6. Negative Service. | | |
| | { | a. Wages. |
| | | b. Lotteries. |
| | | c. Annuities. |
| 7. Aleatory gain . | | d. Bottomry. |
| | | e. Respondentia. |
| | | f. Insurance { a. Fire. |
| | { b. Life, Illness or Accident. | |
| | { c. Marine. | |

II. *Accessory Contracts* are those whose object is to create a right which is to be merely ancillary to another right. Of these the chief are—

- | | | |
|--|--------------|--------------|
| 1. Guarantee. | | |
| 2. Indemnity. | | |
| 3. Security . . . | { | |
| | | a. Mortgage. |
| | | b. Pawn. |
| | | c. Lien. |
| | d. Hypothec. | |
| 4. Warranty. | | |
| 5. Ratification. | | |
| 6. Account stated, and Promissory Notes. | | |
| 7. For further Assurance. | | |

I. PRINCIPAL CONTRACTS.

1. *Alienation.*

Of these there are three chief kinds, Gift, Exchange, and Sale. Alienation. An agreement to give, i.e. to perform a mere act of liberality, be- Gift.

comes a contract when it is (1) expressed in writing, (2) registered, and (3) made on account of natural love and affection between parties standing in a near relation to each other¹. The acceptance of the thing given must be made during the donor's lifetime and while he is still capable of giving. If the donee die before acceptance, the gift is void. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses, and for the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery². In India, as in England, a voluntary alienation is not allowed to defeat the claims of creditors³.

Exchange. Exchange or Barter is where one thing is given for another, neither thing or both things being money only. A transfer of property in completion of an exchange must be made in manner provided for the transfer of such property by sale. The rights and liabilities of the parties are set forth in the Transfer of Property Act, chap. VI.

Sale. Sale is defined in the Contract Act (sec. 77) as 'the exchange of property for a price,' and in the Transfer of Property Act (sec. 54) as 'a transfer of ownership in exchange for a price paid or promised, or part-paid and part-promised.' The formalities imposed on contracts for sale of immovable property are these:—When the property is tangible and worth Rs. 100 or upwards, or when it is intangible (as in the case of a reversion) of any value, there must be a registered instrument. When it is tangible and worth less than Rs. 100 there must be either a registered instrument or delivery. No formalities are required on sales of moveable property, except in the case of shares in a company, which can only be transferred in the manner provided by the regulations of the company⁴. Subject to the observances of those formalities when required, the contract is complete when the price is agreed on. The ownership is transferred in the case of immovable property when the contract is complete. In the case of goods there are special rules applicable, (a) where the goods are unascertained, unmade, or unfinished⁵, (b) where they are sold with immovable property⁶, (c)

¹ Act IX of 1872, sec. 25, cl. 1. This does not appear to include gifts in contemplation of marriage.

² Act IV of 1882, secs. 122, 123. This Act is not yet in force in the Panjáb, the Presidency of Bombay, or Burma.

³ Act IV of 1882, sec. 53.

⁴ Act VI of 1882, secs. 44, 223, and Table A, sec. 9.

⁵ The Contract Act, sec. 79.

⁶ Ibid. secs. 85, 87.

where they are sold by auction¹. An unpaid vendor of immovable property has a charge upon the property in the hands of the buyer for the amount unpaid and for interest thereon². An unpaid vendor of goods has a lien on the goods as long as they remain in his possession³. Where he has parted with the possession of them, he has the right of stoppage *in transitu*, that is, he may, if the buyer becomes insolvent, stop the goods while they are still on their way to the buyer or some person on his behalf⁴, and hold them until the price is paid. Where the buyer of goods fails to perform his part of the contract, the seller having a lien on the goods or having stopped them in transit may, after notice, resell them, and the buyer must bear any loss occurring on such resale⁵.

Special provisions as to sales in execution of decrees are made by the Code of Civil Procedure. Sales for arrears of land revenue are regulated by the local laws dealing with that subject: sales of the property of proclaimed persons who abscond, by the Code of Criminal Procedure, sec. 88.

Assignment of contractual rights. As before remarked, the English common law rule as to the non-assignability of a chose in action has never been in force in India. Transfers of debts and other actionable claims are provided for by Act IV of 1882, secs. 130-138, but those sections do not apply to negotiable instruments. As the primary object of bills of exchange and bills of lading is the assignment of money or goods not in the possession of the assignor, the contracts entered into by those who sue, indorsee, or accept these instruments appear to fall under the head of 'Alienation.' They will, however, be more conveniently dealt with when we come to consider the Negotiable Instruments Act, 1881.

2. *Contracts for permissive use.*

These are (a) loan for consumption (*mutuum*), (b) loan for use (*commodatum*), (c) letting for hire (*locatio conductio*).

(a) A loan for consumption takes place when things which are weighed, counted, or measured (such as wine, oil, corn, money, silver) are delivered to a man on the understanding that he will on a future day return to the person delivering them either the things themselves or their equivalent in kind. Thus, money at a banker's is a loan for consumption to the banker, to be returned when and

¹ Contract Act, sec. 122.

⁴ Ibid. secs. 99-106.

² Act IV of 1882, sec. 55 (4), (b).

⁵ Ibid. sec. 107.

³ Contract Act, sec. 95.

as it is called for by cheques. In the absence of special agreement, interest is not usually due upon the loan. Formerly the highest rate of interest was fixed by law; but the usury laws, as they were called, were repealed by Act XXVIII of 1855¹, which, however, has been held not to affect the Hindú or Muhammadan law as to interest².

Loan for
use.

(b) In a loan for use, which is essentially gratuitous, the borrower (*commodatarius*) must return the identical thing lent, and use it in the meantime in accordance with the terms of the contract. His responsible duty as to taking care of the thing is laid down by the Contract Act (sec. 151). Subject to this provision (which abolishes the English distinctions between the degrees of care required of bailees), he is not liable for wear or tear nor for theft (sec. 152). The lender (*commodator*) may at any time require the return of the thing, even though he lent it for a specified time or purpose (sec. 159).

Letting for
hire.

(c) Letting for hire differs from Loan for use in being for the advantage of both parties, and in England, therefore, a hirer is not bound, in the absence of express stipulation, to exercise the same care as is expected from a borrower. In India, however, the effect of sec. 151 is to make the requisite degree of care identical in both cases. In letting movables no formalities are required; but a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other leases of immovable property may be made either by an instrument or oral agreement³. The rights and liabilities of the lessor of immovable property are specified in the Transfer of Property Act, sec. 108, clauses (a) to (d): those of the lessee in the same section, clauses (e) to (g). As to accidental destruction of the thing let, if any material part of the property is destroyed, the lease, at the option of the lessee, becomes void. As to fixtures, the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth; provided he leaves the property in the state in which he received it. As to

¹ Some rules intended to prevent usury in the Santál Parganas are contained in Reg. III of 1872, sec. 6, and see the Dekkhan Agriculturists Relief Act, 1879, secs. 13, 14.

² 3 Ben. O. C. J. 130 (contra 5 Ben. 500); 3 Bom. H. C., A. C. J. 23; 7 Bom. H. C., O. C. J. 19; 10 Bom. H. C., 385. As to interest

under the Hindú law, see West and B., 3d ed. 746, note (a); 5 Bom. H. C., A. C. J. 196; 9 Bom. 233.

³ Act IV of 1882, sec. 107. In the absence of a special declaration by the Local Government this does not apply to leases for agricultural purposes. Such leases are regulated by local enactments.

emblems, when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them. As to the lessee's power to assign, he may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest, but he does not, by reason only of such transfer, cease to be subject to any of his liabilities under the lease. The lessor must disclose any material defect in the property with reference to its intended use of which he is, and the lessee is not, aware, and which the lessee could not with ordinary care discover. All these rules are subject to any special contract or local usage to the contrary.

3. *Marriage.*

The bulk of the population of India do not regard marriage as a contract at all, and even in the case of Christians, marriage effects a change of status and is not a contract such as those we are now considering, which only create obligations between the parties. It should indeed be dealt with as part of the law of Persons rather than as a branch of the law of Contract. But a promise to marry comes within the domain of Contract, and the suit for breach of that promise is cognizable by most of the Indian courts¹. He who promises marriage also warrants that he is legally capable of marrying the promisee, and is therefore not the less liable for a breach of promise though it may be questionable whether the actual promise to marry was not unlawful². As to the damages recoverable in this suit, see above, p. 506.

Suits for specific performance of marriage will not lie³: nor will the father of a Hindú girl be desired to perform the marriage of his daughter with the person to whom she is betrothed⁴.

When *A*, a Hindú, in consideration of Rs. 100 paid to him by *B*, promised to give his minor daughter in marriage to *B*, and failed to perform his promise, the High Court held that *B* might sue *A* to recover the money⁴. *Quære* whether *A* could have sued *B* for payment of the Rs. 100?

¹ Not by the Presidency Small Cause Courts, Act XV of 1882, sec. 19, cl. (g).

² *Millward v. Littlewood*, 5 Ex. 775, where the promisor was married at the time of his promise.

³ 7 Bom. H. C. O. C. 122.

⁴ 10 Cal. 1054, following 14 W. R. 154. Otherwise in England, where such a transaction would be marriage-brochage, *Keat v. Allen*, 2 Vern. Part 2, 588.

4. *The Creation of a Trust.*

A trust is defined as an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner¹. Here we have to deal only with the contracts to create a trust, which are made when a person agrees for valuable consideration and for the benefit of certain persons to settle specific property. In such cases he becomes a trustee of the property for the intended objects². So where he contracts to charge all lands that he may possess at a particular time or at any time he will be a trustee of such lands to the extent of the charge. And even if a person engage on his marriage to settle all the money and other moveable property that he may acquire during the coverture, the trusts upon which it is so agreed that the property shall be settled will fasten upon it as it falls into possession, and if the money has been laid out in purchase of land it may be followed into such land. But if a person contract to settle such property as he shall die possessed of, he may dispose of his property as he pleases during his lifetime and the covenant will affect only such property as he may leave after payment of his just debts; and if a person contract to secure an annuity either by a charge on land, *or* by investment in Government securities, *or* by the best means in his power, this does not create a charge on his property generally³.

5. *Service.*

The more important contracts for services are, according to Prof. Holland, (a) for caretaking; (b) for doing work on materials; (c) for carriage; (d) for professional services; (e) for domestic services; (f) for agency; (g) for partnership.

Caretaking. (a) Caretaking. This is either gratuitous or for reward. The former is called deposit, and the only statutory provision relating to it is the article in the Limitation Act as to suits against depositaries. Caretaking for reward is exercised by bankers, warehousemen, wharfingers, the 'cloak-rooms' of railway companies, livery-stable-keepers, and inn-keepers. Bankers and wharfingers have a general lien⁴; and in Bombay an innkeeper has been held liable for theft of an article stolen from his hotel⁵.

¹ Act II of 1882, sec. 3; see *infra*.

² *Finch v. Earl of Winchelsea*, 1 P. W. 277, and other cases cited in Lewin on Trusts, 8th ed., 140.

³ Lewin, 141.

⁴ Contract Act, sec. 171.

⁵ 3 Bom. H. C., O. C. J. 137, where it was said that in Bombay there is no

(b) Doing work on materials. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a lien on the goods till he has been paid for his trouble¹.

(c) Carriage. A contract of carriage may relate to conveyance by land or by 'inland navigation,' or by sea, and to goods or to passengers. The liability of common carriers by land or inland navigation for loss in case of certain goods is defined by Act III of 1865, sec. 3; as to the similar liability of Railway Companies, see Act IV of 1879, sec. 10². As to the right of a bailee for carriage, see Act IX of 1872, sec. 158. Special rules as regards carriers by Tramway are contained in Act III of 1865, sec. 7, and Act XI of 1886, sec. 16. So far as the provisions of these Acts do not apply, carriers are governed by the English Common Law³. In cases of sale, delivery to a common carrier, or to a carrier designated by the buyer, for the purpose of being conveyed to him or according to his directions, has the same effect as delivery to the buyer⁴. But so long as goods, though delivered to a common carrier appointed by the consignee, remain at the risk of the consignor, they are not delivered to the consignee⁵.

As to the liability of persons sending goods of a dangerous nature by carrier, see 1 All. 60.

That a carrier is bound to deliver within a reasonable time; as to the compensation recoverable from him on account of delay; and that he is entitled to a lien for his freight and charges, see 2 Agra, 132. That a Railway Company must keep goods which have reached the station of their destination ready there for delivery till the consignee in the exercise of due diligence can call for and remove them, see 3 Bom. 96.

The carriage of goods by sea is usually regulated by special contracts between the ship-owner and the freighter or shipper called 'charter-party' and 'bill of lading,' by which the owner is generally relieved from liability for the act of God, the Queen's enemies, fire and sea-risks. Decisions of the Indian Courts on charter-parties will be found in 6 Ben. Appx. 20; 8 Ben. 340, 544; 2 Mad. H. C. 88; and 7 Bom. H. C., O. C. J. 144⁶. As to law but the common law of England to regulate the relation of innkeeper and guest in a case between a European and a Parsi. There is nothing in India like 26 & 27 Vic. c. 41.

¹ Contract Act, sec. 170.

² 10 Cal. 210.

³ 10 Cal. 166, dissenting from the decision of Couch C.J. in 3 Bom. 109, relying on which the legislature acted in passing sec. 10 of Act IV of 1879.

⁴ The Contract Act, sec. 91.

⁵ 1 Mad. H. C. 200.

⁶ 'Charter-party' is defined and

bills of lading, see 3 Mad. 107; 4 Bom. H. C., O. C. J. 169; 6 Bom. H. C., O. C. J. 71; and 7 Bom. H. C., O. C. J. 186.

The Indian Government, like the Postmaster-General in England, is exempt from liability for loss of or damage to anything intrusted to the Post Office for conveyance¹.

Professional service.

(d) Professional service. A professional man employed for reward (*locator operarum*) is held in England to guarantee that he is reasonably skilful and competent, and can recover nothing for unskilful work². The two chief professions in India are the legal and the medical. In India, as in England, a barrister who is also an enrolled advocate is incapable of making a contract or suing for his fees³. But it has been held that a suit will lie against a barrister, not being an advocate, for failing to appear in a sessions case⁴. Pleaders in Madras, and probably elsewhere, are prohibited by an order of court from enforcing agreements for remuneration on condition of success⁵. The Indian Courts look unfavourably on agreements to pay a pleader with a share of the spoil. But that an agreement to pay a vakil in the event of success a certain sum in addition to his full fees, if made contemporaneously with the *vakalatnāma*, is not void as being *nudum pactum*, see 8 Bom. 413: otherwise when the agreement was subsequent to the acceptance of the *vakalatnāma*, 2 Bom. 362.

That a vakil has no implied power to compromise a suit, see 2 Mad. H. C. 423, and 2 Agra 222, following *Swinfen v. Swinfen*.

That the contract implied from the employment by an insolvent's trustees of an attorney to carry on a suit already commenced by the insolvent as plaintiff, in which the attorney was retained for him in a contract to pay only *future* costs, 5 Bom. H. C., O. C. J. 163.

As regards medical men, there is no law in India like the English Medical Act, 1858 (21 & 22 Vic. c. 90). But there is no presumption such as formerly existed in England, that a physician's services were honorary. Questions have often arisen as to the amount payable for attendance. The gold mohur in India generally represents the professional guinea in England; and in one case the High Court of the N. W. Provinces accepted the opinion of an

the stamp duty (one rupee) on that instrument is prescribed by Act I of 1879, sched. I, No. 18.

¹ 1 Mad. H. C. 200.

² Holland, ch. xii, citing *Grill v. Gen. Iron Srew Collier Co.*, L. R. 1 C. P. 612.

³ 3 N. W. P. 83; 6 N. W. P. 43;

3 Mad. 140. The decision in *Kennedy v. Brown*, 13 C. B., N. S. 677, governs all agreements made in India by barristers, as such, 3 Mad. 138.

⁴ 4 Mad. H. C. 244.

⁵ Compare the Attorneys Act, 1870, sec. 11.

experienced medical officer that in the case of a public servant six days' salary, or one-fifth of the [monthly] income, is the proper amount of a remuneration for a year's attendance on his family, when there has not been an extraordinary sickness or an accouchement ¹.

(e) Master and Servant. The Indian legislature has dealt with the criminal breach of this contract by the servant; but has done little to define and amend, except in the territories subject to the Indian Emigration Act, the law regulating the mutual civil rights and liabilities of employer and employed. In fact the statutory law on this subject is now even more defective than it was twenty-four years ago. Owing to a slip in the Contract Act, s. 11, minors cannot now enter into contracts of service; and the rules as to the notice terminating the contract, which were contained in the Bengal Regulation VII of 1819, s. 6, were repealed by Act XVII of 1862. The master's liability for his servant's acts falls under the law of principal and agent ², and there is a special provision as to the liability of the proprietor of a stage-carriage for certain acts done by his driver ³. An order for winding up a company is notice of discharge to its servants, except where its business is continued ⁴. The servant's preferential right to payment of wages from the estate of his deceased master is declared by the Succession Act ⁵; and the wages of labourers and domestic servants are exempt from attachment under the Code of Civil Procedure ⁶.

Magistrates have a summary jurisdiction in disputes as to wages, hire of carriage, and price of work between employers and their workmen employed in constructing railways, canals, and other public works ⁷, and under Act XIII of 1859 fraudulent breach of contract by workmen is punishable ⁸, and there is (or was) a Bombay Rule, Order, and Regulation, I of 1814, as to domestic servants ⁹.

The penal legislation above referred to is justified by the inutility, in the case of most servants, of the ordinary remedy by suit for damages. For the same reason, there should be a summary power (exercisable by selected magistrates) to enforce a domestic servant's principal duties. The complaint should be made promptly and by the head of the household. On the other hand, the servant

¹ 2 Agra, Civ. Court App. 56.

² Contract Act, secs. 226-238. As to the liability of the Secretary of State for the acts of public servants, see 1 N. W. P. 204.

³ Act XVI of 1861, secs. 8, 13.

⁴ Act VI of 1882, sec. 137.

⁵ Act X of 1865, sec. 281. There is as yet no corresponding provision in the case of companies. But a bill to

supply this defect has been introduced.

⁶ Act XIV of 1882, sec. 266 (j), expt.

⁷ Act IX of 1860. But this Act (in force in the Panjáb, part of the Bombay Presidency, and part of the Central Provinces) has not been brought into force throughout British India.

⁸ See 3 Mad. H. C. Rulings, xxv.

⁹ See 3 Bom. H. C. Appendix I.

should have a simple, cheap, and speedy remedy against a master who wrongfully discharges him or withholds his wages. Clauses framed for this purpose are contained in the Master and Servant Bill settled in 1879 by the Indian Law Commission. The same Bill decides several questions as to terms of service, the notice putting an end to the contract, wages and compensation, which have been raised in the Indian Courts, and deals thus with the duty of masters as to servants employed in dangerous work:—

‘Where the servant is employed in a work of danger the master must (1) use reasonable endeavours to provide proper materials and apparatus for the work, and (2) take all other reasonable precautions so as to protect the servant against unnecessary risk; and where the servant is employed in such work along with fellow-servants, (3) use reasonable endeavours to provide fellow-servants of ordinary care and reasonable skill.’

Various points as to the law of master and servant have come before the Indian Courts. Thus, the fact that the agreement expressly states the grounds of dismissing a servant does not preclude his master from dismissing him for incompetence¹. A master is not liable for the criminal acts of his servants², but he may be liable for damage occasioned by their negligence³, and the Secretary of State in Council’s liability for damage caused by the servants of Government resembles that of a private employer⁴. As to the gratuity given by a tradesman to a servant when an account is settled by his master for a specific sum, see 8 All. 120. ‘In the absence of any evidence as to usage . . . no domestic servant who is hired by the month has a right to leave his employment without sufficient reason, and without any notice to his master of his intention to leave. What should be sufficient notice in such a case it might be difficult in the absence of evidence to determine⁵.’ A servant leaving after due notice is entitled to receive at once all arrears of pay then due to him, without reference to the custom of the office or master he serves⁶. But where a servant engaged by the month served from 1st Nov. to 3rd Dec. and left on 4th Dec. without giving notice, he was held entitled to his wages to the end of Nov., but forfeited those payable for his December services⁷.

¹ 2 Cal. 33. As to the measure of damages for a wrongful dismissal, see *Beckham v. Drake*, 2 H. L. Ca. 606.

² 9 Cal. 849.

³ 7 Bom. 119, where the master was the proprietor, and the servant the driver, of a public conveyance.

⁴ 5 Bom. H. C., Appx. 1.

⁵ *Christophridi v. Gooljar*, reported in Sconce’s *The Master and his Domestic Servant*, Calcutta, 1881.

⁶ 2 Agra, Misc. Ap. 1.

⁷ 10 Bom. H. C. 57.

As to shipmasters and seamen and their wages and discharge, see 17 & 18 Vic. c. 104, secs. 205, 207¹, and the Indian Act I of 1859, sec. 58².

It will be remembered that every contract which has for its object the rendering of personal service is discharged by the death or incapacitating illness of the promisor³.

(f) The relation of Master and Apprentice is regulated by Act Master and XIX of 1850, which should now be revised with reference to the apprentice. changes produced by recent legislation and by the establishment in India within the last thirty-six years of railway-workshops, factories and steam packet companies⁴. The superintendents of Reformatory Schools are declared to be guardians within the meaning of the Act, and may bind youthful offenders as apprentices⁵.

Special provisions as to apprentices to sea-service are made by Act I of 1859, sec. 4, and 17 & 18 Vic. c. 104, secs. 141-145.

(g) Agency. Contracting by Agents and the Contract of Agency Agency. are not clearly distinguished by the Indian Contract Act. In other words, the extent to which the rights and liabilities of contracting parties (including the agent himself) may be affected by their contract being made through an intermediary, are dealt with in the chapter which regulates the contract for services entered into between a principal and his agent to represent the former in dealings with third parties.

The contract of Agency, like every other contract not falling within the specified exceptions, requires a consideration⁶, and the statement in sec. 185 seems only to mean that no *express* consideration is necessary. No formalities are required, except when the contract must for certain purposes be entered into by a power of attorney⁷.

As to the rights of the Agent, it seems (though the Act is silent on the point) that, in the absence of evidence to the contrary, he would be entitled to reasonable remuneration for business properly conducted (sec. 220), but this is not payable till the business is completed (sec. 219). He may do everything necessary to enable

¹ 6 Bom. H. C., O. C. J. 42.

² Ibid. 138.

³ Anson, 324, citing *Robinson v. Davison*, L. R. 6 Exch. 269, where, however, Bramwell B. said that the parties might expressly contract that incapacity should not excuse and thus preclude the condition of health from being annexed to their agreement.

⁴ Chapter v and secs. 33-38 of the

Master and Servant Bill, settled by the Indian Law Commission, 1879, contains a revised draft of the Apprenticeship Act.

⁵ Act V of 1876, secs. 17, 19.

⁶ Contract Act, sec. 25.

⁷ India stock, 43 Vic. c. 11. Under the Civil Procedure Code, secs. 35, 37, 39, 465. Under the Registration Act III of 1877, secs. 32, 33.

him to perform the act or conduct the business comprised in his authority. In an emergency he may act for the purpose of protecting his principal as a person of ordinary prudence would act in his own case under similar circumstances: he may under certain circumstances employ a sub-agent. His duties as to conducting the business of the agency, rendering accounts and communicating with the principal, are prescribed by secs. 211-24. The principal's duties to the agent are described in secs. 222-225. The agency terminates, according to the Act, (a) when the business is completed, (b) when the principal revokes the authority, dies, or becomes of unsound mind or insolvent, (c) when the agent renounces, dies, or becomes of unsound mind. The agent's insolvency, and the expiration of the time within which the business must be performed, appear to have been forgotten.

The principal is not bound to third persons where the agent acts *extra vires*. Thus if *A* instructs his agent *B* to contract to deliver cotton at the end of Kartik, but *B* contracts with *C* to deliver cotton by the middle of that month, *A* is not bound to *C*¹.

As to proving the authority of an agent who underwrites a policy, see 7 Bom. H. C., O. C. J. 39.

Partnership.

h. Partnership. This contract is defined as 'the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them².' This definition is taken from Kent's Commentaries, iii. 23. But as Jessel M.R. pointed out³, there may be partners who do not contribute any property, labour or skill, as when a share is given to the widow of a former partner. Each partner who does any act usually done in carrying on the business of the partnership binds his co-partners to the same extent as if he were their agent duly appointed for that purpose⁴, unless where the act contravenes an agreement between the partners of which the person to or for whom the act is done has notice.

No formalities are required, whatever may be the amount of the partnership property, or the length of time during which the partnership is to continue.

¹ 8 Bom. H. C., A. C. J. 19; 10 Bom. H. C. 319; and 7 Cal. 253, where *A* by power of attorney authorised *B* to sell or mortgage *A*'s property for the payment of his debts, and *B* executed a simple money-bond to one of *A*'s creditors for payment of the sum due and interest. That 'power to sell' means only a power to sell in

the ordinary course of business, i. e. for a price, see 9 Cal. 1, per Wilson J. See more as to the construction of powers of attorney, 10 Cal. 901.

² Contract Act, sec. 239. This excludes the *leonina societas*.

³ 5 Ch. D. 472, 473.

⁴ Contract Act, sec. 251.

The rights and duties of partners to each other are, in the absence of a contract to the contrary, determined by the rules set forth in sec. 253. Each partner must render accounts to the others¹, and (in the absence of a contract to the contrary) is bound to attend diligently to the partnership business². On the other hand, he has a right to be indemnified by the firm for payments made and personal liabilities incurred by him in the proper conduct of its business, or for the preservation of its business or property. The Contract Act omits to provide for this important right. Similar omissions are a rule that the place where the business is carried on shall not be changed without the consent of all existing partners, and a rule that the partnership-books shall be kept at the place (or principal place) of business of the partnership, and that every partner may have access to them.

As to the liability and authority of partners in respect of partnership dealings the Act is equally defective. There should, for instance, be a proviso to sec. 246 that, where, after a partner's death, the business is continued in the old firm-name, the continued use of that name, or of the deceased partner's name as part thereof, shall not of itself make his representatives liable for partnership debts contracted after his death. There should be a list of the special powers of every partner to sell, buy, receive payment of debts, hire servants, and draw cheques, and also, in case of certain partnerships, draw etc. bills, borrow money on the credit of the firm, and for that purpose pledge its goods, and where practicable, make a mortgage of its immovable property by deposit of title-deeds.

The provisions as to the dissolution of partnerships and its consequences are also defective. Only three cases are mentioned in which a partnership is dissolved without the intervention of the Court, namely, 1. where 'any member of a partnership ceases to be so' (sec. 253, cl. 7); 2. where any partner dies (sec. 254, cl. 10); and 3. where the business is prohibited by law (sec. 255). But a partnership is also dissolved, if entered into for a fixed term, by the expiration of that term, and if entered into for a single undertaking, by the termination of that undertaking. Cases where a member of a partnership incumbers his interest in the partnership property or profits are not provided for by the Act.

The enumeration of the cases in which the Court dissolves a partnership is not complete. It omits the case when a partner is convicted of a crime or becomes liable to a prosecution, and there is no general clause authorising the Court to act whenever circumstances have arisen which render it right that the partnership be dissolved.

¹ Contract Act, secs. 257, 258, 259.

² Ibid. sec. 253, cl. 4.

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The provisions operating after a dissolution are somewhat meagre and obscure. For instance, sec. 261 gives a rule as to the liability of the estate of a partner who dies, but none when a partner becomes insolvent or retires. And sec. 264 does not define 'public notice,' or draw the desirable distinction between creditors who were, and creditors who were not, customers of the firm before the date of the dissolution. The two sections might be amalgamated and redrawn as follows:—

'The rights of a creditor of a firm against its apparent members shall not be affected by any dissolution or change in the firm of which the creditor had not notice.

'When the sole or principal place of business of a firm is in any Province of British India, an advertisement in the local *Government Gazette* shall be deemed to be a notice as to creditors who were not in fact customers of the firm before the date of the dissolution or change so advertised.

'Provided that the estate of a partner who dies or becomes insolvent, or who, not having been known to the creditor to be a partner, retires from the firm shall not be liable for partnership debts contracted after the date of the death, insolvency, or retirement respectively.'

Nothing, again, is said as to the sale of the good-will; the right of each partner to restrain the use of the partnership name by any other partner; the apportionment of premia paid on entering a partnership for a fixed term; the lien on the partnership assets, where the partnership has been dissolved for fraud of one partner, for money paid by a defrauded partner for the purchase of an interest in the partnership property; the right of an outgoing partner in certain cases to share profits after dissolution. Provisions on all these subjects, expressed in language of rare clearness and accuracy, will be found in the Bill to consolidate and amend the law of partnership drawn by Mr. F. Pollock, which passed a second reading in the House of Commons in 1880, and illustrations (almost wholly wanting in chap. xi. of the Contract Act) will be found in his Digest of that law.

Many of the tenures in India are in the nature of a partnership in which the landholder participates with the cultivators in the crop. In such cases, therefore, the English rule, that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act injures his reversion, does not apply¹.

As to the measure of damages for breach of contract to admit to a partnership, see *Lewin v. Morrison*, 3 Agra 151, where the

¹ 2 Mad. 232.

partnership was to last for two years, and the Court awarded the plaintiff what would have been his share of one year's profits.

6. *Negative Service.*

Contracts for negative service, in which one party promises to abstain from certain acts, are dealt with by the Contract Act, secs. 26, 27, and 28. They are still more grudgingly recognised by the Indian than by the English law. Thus, by sec. 27 an agreement by an adult not to marry a specified person would be void. Under sec. 27 agreements by commercial travellers not to travel in certain districts, and agreements by clerks and apprentices not to carry on their masters' trades, are void. And it has been ruled that an agreement in restraint of trade, to be performed in British India, entered into in England, though valid by the *lex loci contractus*, is void in India unless it comes within one of the three exceptions to sec. 27¹.

7. *Aleatory Gain.*

(a) *Wagers.* Agreements for the payment of money or transfer Wagers. of other property on the occurrence of a specified uncertain event are also discouraged, unless when made for commercial objects, or to insure against death or fire. Thus, by the Contract Act, sec. 30, all agreements by way of wager are void, except agreements to subscribe to a prize of Rs. 500 or upwards to be given to the winner of a horse-race². To constitute a wager the transaction must 'wholly depend on the risk in contemplation,' and neither party must look to anything but the payment of money on the determination of an uncertainty. But if one of them has 'the event in his own hands,' the transaction is not a wager³.

(b) *Lotteries* are illegal under the Penal Code, sec. 294. But a *Lotteries.* transaction is not necessarily a lottery because a matter of whatever kind is agreed to be decided by lot. Where, therefore, twenty persons agreed that each should subscribe Rs. 200 by monthly instalments of Rs. 10, and that each in his turn as determined by lot should take the whole of the subscriptions for one month, this agreement was not illegal⁴.

(c) *Annuities.* The Indian Code, unlike the French, contains no *Annuities.* provision as to an agreement to pay an annuity so long as A lives.

¹ 1 Mad. 134.

² It does not appear why yacht-races, boat-races, and foot-races were excluded from the benefit of the exception. In the corresponding English enactment (8 & 9 Vic. c. 109) the exception extends to the winner of any lawful game, sport, pastime, or

exercise, 'quod virtutis causa fiat,' Dig. xi. 5. 2, cited by Holland, 247. There is a local Act as to wagers in Bombay (III of 1865), which seems void so far as it purports to affect the jurisdiction of the High Court.

³ 9 Bom. 358.

⁴ 1 Mad. H. C. 448.

Under the Code Civil, § 1968, such agreement is void if the person on whose life it depends is ill at the time it is made, and dies of the same illness within twenty days.

Bottomry. (d) Bottomry is a loan to a shipowner secured on the hull, to be repaid only in case a voyage ends successfully. The Indian statute-book is silent as to this contract, except in illustration f to sec. 425 of the Penal Code, and in the Stamp Act, sec. 29 (a), and Sched. I, No. 15. The High Court at Calcutta has ruled that the master's claim for wages is prior to that of the bottomry bondholder¹.

Respondentia. (e) Respondentia is a similar loan to a shipowner, but it is secured on the cargo. The Indian statute-book is silent as to this contract, except in the Stamp Act, sec. 29 (a), and Schedule I, No. 55.

Insurance. (f) Insurance is defined as 'a contract by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation if, or when, the event shall happen by which the loss is to occur'.²

Marine insurance is specially noticed in three Indian Acts, namely, V of 1866, which empowers the assignee of a policy to sue in his own name; I of 1879, sec. 66, which imposes a penalty for not drawing the full number of policies when they purport to be in sets; and XV of 1882, sec. 19 (I), which excludes suits on policies from the jurisdiction of the Presidency Courts of Small Causes.

Questions relating to marine insurance have often come before the High Courts when the parties were Europeans³; and when the defendants, underwriters of a policy of insurance on goods on board a vessel bound from Bombay to Calcutta, were Hindús, but no principle of Hindú law was applicable, and the contract was expressed in English, the English law was held to apply⁴. The native merchants of Kachh-Mandri and Bombay trade with the ports of Madagascar and East Africa by means of native vessels, which leave the Indian ports early in the year and return in August or September. This trade consists in shipping goods at the Indian ports to be disposed of at the African and Madagascar ports, and purchasing with the proceeds fresh goods to be disposed of in the Indian ports. The traders borrow money of merchants on *avung*, i. e. on condition that it is not to be repaid except in case of the safe arrival in India of the goods bought in Africa, in which event the loan becomes repayable

¹ 5 Ben. 258.

² Holland, 249.

³ See 6 Ben. 218; 7 Ben. 347; 15 Ben. Appx. 3. In the following cases the parties were Natives: 1 Bom. H. C. 6, 229; 3 Bom. H. C., A. C. J. 1 (as to loss by robbers); 7

Bom. O. C. 39. As to salvage, see 2 Mad. H. C. 355. In 6 N. W. P. 311 the rescue was from a danger incurred on inland waters.

⁴ 12 Bom. H. C. 23, and see 3 Bom. H. C., A. C. J. 1; 2 Bom. 550; 4 Bom. 314.

with interest at a high rate. This does not give the lender a charge on these goods; but he has an insurable interest in them¹.

Fire-insurance is specially noticed by Act V of 1866, sec. 15, ^{Fire-insurance.} which empowers the assignee of a policy to sue thereon in his own name; Acts XXVIII of 1886, sec. 17, and IV of 1882, secs. 69, 72, which declare the mortgagee's right to insure mortgaged property; Act IV of 1882, sec. 76 (*f*), which directs how money received by the mortgagee under the policy is to be applied; and the same Act, sec. 49, which declares the right of the transferee of immovable property insured against loss or damage by fire to require the transferor to apply the insurance-money in reinstating the property. There are also local provisions that damage done by the fire-brigade shall, for the purpose of the policy, be considered damage by fire. The practice of insuring against damage by floods, drought, or hail, has not, so far as I know, been introduced into India.

Life-insurance. As to this the only statutory provisions are ^{Life-insurance.} those contained in Act III of 1874, secs. 5 and 6, which authorise a married woman to effect a policy on her own behalf and independently of her husband, and declare that a policy effected by a married man on his own life and expressed to be for the benefit of his wife or of his wife and children, shall be deemed a trust for her or their benefit. But these provisions do not apply to women who at the time of their marriage were Hindús or Muhammadans, or whose husband was then a Hindú or Muhammadan (sec. 2). The right of insuring without any interest in the risk insured against is not restricted in India, the English statutes, 9 Geo. II, c. 37, and 14 Geo. III, c. 48, not extending to that country.

The stamps on policies generally are regulated by Act I of 1879; the limitation of time for suits on policies by Act XV of 1877, Sched. II, Nos. 86 and 87: forms of complaints in suits arising out of policies are given in the Civil Procedure Code, Sched. IV, Nos. 49-54; and provisions as to insurance-companies are contained in Act VI of 1882, secs. 3, 6, 61, 130, 131, 225, and the local Madras Act VI of 1869.

Having thus noticed the seven classes of principal contracts which are made in India, we now proceed to consider the chief contracts entered into for the purpose of creating rights which are to be merely ancillary to other rights.

II. ANCILLARY CONTRACTS.

1. *Guarantee.*

The chief rules relating to this matter (sometimes called surety-¹ Guarantee.

¹ 4 Bom. 305.

ship) are found in the Contract Act, chapter VIII. The contract of guarantee is defined (sec. 126) as 'a contract to perform the promise, or discharge the liability, of a third person in case of his default.' The Act does not say that the 'promise' and 'liability' here referred to must be legally enforceable, and it might therefore be argued that in India, as in France, there may be a good guarantee of a promise made by a minor. But the use of the expressions 'principal debtor' for the person in respect of whose default the guarantee is given, and 'creditor' for the person to whom it is given, and 'contract' between the principal [debtor] and creditor (sec. 133), shows that the Indian legislature did not intend to depart from the English doctrine that the obligation of the principal must not be merely a natural one. The surety's liability is coextensive with that of the principal debtor, unless it is otherwise provided by the contract¹. It may, therefore, be less than that of the principal debtor, but no doubt it would be held (though the Act does not say so) that it may not be greater. As regards transactions occurring before his death, the surety's liability devolves on his representatives; but, in the absence of a contract to the contrary, his death revokes a continuing guarantee, so far as regards future transactions (sec. 131).

As between the surety and the creditor, the surety is discharged by the various acts, which alter or extinguish the principal debtor's liability², or impair the surety's eventual rights³. Mere forbearance on the creditor's part does not discharge the surety (sec. 137). But as a rule the acceptance of interest in advance by the creditor operates as giving time to the principal debtor, and consequently as a discharge to the surety⁴. The surety may be sued, though the principal debtor has not been sued⁵, or though the surety himself had begun to perform that for the non-performance of which he has made himself liable.

As between the surety and the principal debtor, when the latter has made default and the surety has in consequence discharged the obligation, he is invested with all the rights which the creditor had against the principal debtor⁶. The surety is also entitled on an implied contract to be indemnified by the principal debtor⁷.

As between several sureties, one who discharges the debt for

¹ Sec. 128.

² Secs. 133, 134, 135.

³ Sec. 139.

⁴ 4 Cal. 134, and see 6 Cal. 241 as to the liability of an accommodation acceptor of hundis who knew that the drawer had paid advance interest

to the holder to obtain time for payment after due date.

⁵ 7 Mad. H. C. 368. And see 4 Mad. H. C. 190, where it is said that this is not opposed to Hindú law.

⁶ Secs. 140, 141.

⁷ Sec. 145.

which all are jointly liable is entitled to contribution from the others ¹. A release of one co-surety does not discharge the others, nor does it free him from his responsibility to the others ².

A guarantee given in respect of the transaction of a firm is revoked as to future transactions by change in its constitution ³.

The contract is not a formal one in India. In England, by the Statute of Frauds, a guarantee must be in writing, but the Indian Contract Act, sec. 126, expressly declares that a guarantee may be either oral or in writing ⁴. As to oral evidence of a guarantee, see 2 N. W. P. 210.

Questions relating to guarantee have often come before the Indian Courts ⁵.

As to what are called 'companies limited by guarantee,' see Act VI of 1882, sec. 9.

2. *Indemnity.*

This contract is defined as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promiser himself, or by the conduct of any other person ⁶.'

It may be express or implied. In every contract of guarantee there is an implied promise to indemnify the surety ⁷; in every contract of agency there is an implied promise to indemnify the agent if he acts in good faith (sec. 223). The following are other cases in which it would be implied:—

(a) *A* an unpaid seller of goods, who has parted with their possession, hearing that *B* the buyer is insolvent, stops the goods while they are in transit to *B*. *B* turns out to be solvent; *A* must indemnify *B* for expenses incurred by the stoppage ⁸.

(b) *A* assigns to *B* his interest under a lease. *B* fails to perform the contracts binding on the lessee, and the lessor consequently compels *A* to perform them. *B* must indemnify *A* for the expenses of performance as well as for his costs reasonably incurred in resisting, reducing, or ascertaining the claim made against him by the lessor ⁹.

The rights of the promisee are set out in sec. 125; but by an unaccountable omission nothing is said of the rights of the promisor. He would probably be held entitled, on performing his

¹ Sec. 146; see sec. 43.

² Sec. 138.

³ Sec. 260.

⁴ It had been ruled that a contract of guarantee by a Hindú was not affected by the Statute of Frauds, sec. 4; 5 Ben. 639, 643.

⁵ See, for instance, 1 Bom. H. C. A. C. J., 135; 7 Bom. H. C., A. C. J. 118; 3 N. W. P. 106; 6 N. W. P. 170. See also 9 Cal. 355.

⁶ Contract Act, sec. 145, and see sec. 159 as to the liability of the lender of a thing for use for a specified time who recalls it before the time expires, and sec. 164 as to the liability of a bailor where the bailee sustains loss from the bailor's want of title.

⁷ Code Civil, art. 2012.

⁸ *The Constantia*, 6 C. Rob. Ad. 321.

⁹ 5 Cal. 811.

promise, to the benefit of every remedy by which the person indemnified could have protected himself against, or reimbursed himself for the loss¹.

A policy of marine insurance, at least when it does not contain the words 'interest or no interest,' is construed as a contract of indemnity².

3. *Security.*

The chief contracts intended to create rights subsidiary to rights to receive a certain value from another are (a) Mortgage, (b) Pledge, (c) Lien, and (d) Hypothec. Of these in their order.

Mortgage. (a) Mortgage is defined as 'the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability³.' The different kinds of mortgages, and the respective rights and liabilities of mortgagors and mortgagees, will be noticed when we come to deal with the Transfer of Property Act. There are no statutory provisions as to mortgages of movables.

Pledge. (b) Pawn. This is defined as 'the bailment of goods⁴ as security for payment of a debt or performance of a promise⁵.' Here the debtor (who is called the 'pawnor') is entitled not only to have the goods redelivered to him on due payment of the debt or performance of the promise⁶, but also to have them preserved with the care described in sec. 151. On the other hand, the creditor (the 'pawnee') is entitled to retain the goods for the payment of the debt,⁷ the interest thereon, and 'all necessary expenses' incurred in respect of the possession or preservation of the goods. This seems to include ordinary as well as extraordinary expenses. As to the latter the pawnee is given a right to sue the pawnor when they are incurred for the preservation of the goods⁸. If the pawnor makes default, the pawnee has two remedies: he may sue the pawnor on the debt, retaining the goods as a collateral security; or he may sell them on giving the pawnor reasonable notice of the sale; but if he sells and the proceeds are greater than the amount

¹ *Simpson v. Thomson*, 3 App. Ca. 284, per Lord Cairns L.C.; and compare the Contract Act, sec. 141, as to the right of a surety.

² 4 Bom. 305.

³ Act IV of 1882, sec. 58.

⁴ 2 N. W. P. 43, where the Court said that a deposit or pawn was of movable property, not of land.

⁵ Contract Act, sec. 172.

⁶ The Act provides for this only

where a time is stipulated for the payment or performance. The case where no such provision is made appears to have been forgotten.

⁷ A pawnee in possession of a judgment debtor's goods is entitled to have them released from attachment and the costs of his suit paid by the execution creditor, 5 Ben. App. 31.

⁸ Sec. 175.

due he must pay the surplus to the pawnor. No such remedy is given by the Act where the pledge is to secure performance of a promise, and no time is fixed for such performance.

A pawnor who repledges the goods pledged to him may be guilty of criminal breach of trust¹. And when he wrongfully converts them to his own use the compensation for which he is liable is their value less the sum for which they were pledged².

As to the stamp or instruments of loan on the security of pledges see Act I of 1879, sec. 29 (a) and Sched. I, No. 29; and as to the limitation of time for suits by pawnors, Act XV of 1877, Sched. II, Nos. 133, 145.

There are in India no laws regulating the trade of lending money upon pledge such as the Pawnbrokers Acts in England.

(c) Lien. This is a right depending on possession, and is lost the Lien. moment that possession is parted with³. Liens are special or general. A special lien is the right of retaining property till the retainer's claims in respect of it have been satisfied. A general lien is the right to retain bailed goods till the 'general balance of account' due to the bailee by the bailor has been satisfied.

Special liens exist in the following cases:—an unpaid seller of goods⁴; a bailee who has, 'in accordance with the purpose of the bailment, rendered any services involving the exercise of labour or skill in respect of the goods bailed⁵'; a finder of goods who has incurred trouble and expense in preserving the goods and finding out the owner⁶; a finder of goods where the owner has offered a specific reward for their return⁶; an agent who has sold his principal's goods⁷; an agent entitled to be paid for commission, disbursements and services⁸; and, lastly, partners upon dissolution⁹; then each partner has a lien on the partnership property for the purpose of having it applied, first, in payment of the debts of the firm and then in payment of his separate debts.

Where a ship-captain, failing to raise funds on a bottomry bond to repair damage caused to a ship by stress of weather, sold a

¹ 6 Mad. H. C. Rulings, xxviii.

² 5 Bom. H. C., O. C. J. 140.

³ *Donald v. Suckling*, L. R., 1 Q. B. 612. 'A right of lien, properly so called, is a mere personal right of detention,' per Blackburn J.

⁴ Contract Act, sec. 95. The unpaid vendor of immovable property has a charge on the property in the buyer's hands. Of course a creditor of the vendor has no such charge, 9 Cal. 167.

⁵ Contract Act, sec. 170. As to a

carrier's lien for unpaid freight, see 8 Ben. 340.

⁶ Contract Act, sec. 168.

⁷ Ibid. sec. 219.

⁸ Ibid. sec. 221.

⁹ Ibid. sec. 262. It has been decided that a mere letter of boats for hire has not a lien upon goods placed therein, 5 N. W. P. 160, and that a Muhammadan wife has no lien on her husband's property for deferred dower, 2 Ben. A. C. 306.

portion of the cargo for such purpose and repaired the ship, the owner of that portion has no maritime lien¹.

General liens exist only in the cases of bankers, factors, wharfingers, attorneys of a High Court², and policy-brokers³.

Various enactments have given the Government liens on land and crops for land-revenue, quit-rents, nazránas, road-cess⁴; on forest-produce⁵; and on goods imported or exported for unpaid duty⁶.

Some local Acts⁷ also give landholders a lien on the produce of land for rent due in respect thereof. And an under-tenant in the Lower Provinces advancing money to preserve a patni taluk from sale has a statutory lien for the amount.

The so-called charging-lien of a legal practitioner on a fund decreed to his client, is recognised in India both by the legislature⁸ and the Courts. The plaintiff in a properly constituted interpleader suit has a similar lien for his costs on the fund in dispute⁹.

Hypothec. Hypothec. There may be a security under which not only the ownership of a thing but its possession remains with the debtor¹⁰. Thus the security called a 'simple mortgage' in the Transfer of Property Act, sec. 58, is a hypothec. So where a landlord distrains his tenants' goods they remain in the tenants' possession until the landlord exercises his power of sale. So where the master of a ship raises money on the security of the ship, which remains in his possession.

Warranty. Warranty is a term annexed expressly or by implication to a contract, but collateral to its main object. It may be broken and give rise to a right to sue for compensation, without producing any effect on the contract to which it is annexed¹¹.

It refers, in the Contract Act, either to title or to quality:

To title, where the buyer of goods or any one claiming under him is deprived of them by reason of the invalidity of the seller's title¹²: where the bailee of goods sustains loss because the bailor

¹ 5 Mad. 336, following *Hussey v. Christie*, 9 East, 426, 432.

² 4 Bom. 353 (lien on translations made by the Court's interpreters).

³ *Ibid.* 171. This does not give the attorney an absolute lien, available even if he ceases to act for his client. If, then, a firm of attorneys dissolve partnership this operates as a cessation, and the attorneys must hand over a client's papers to him or his representative, 6 Cal. 1.

⁴ Mad. Act II of 1864, secs. 2, 17, 32; Bom. Acts II of 1863, sec. 15, VII of 1863, sec. 30, and V of 1879,

secs. 138, 143; Ben. Act X of 1871, sec. 23, etc.

⁵ Mad. Act V of 1882, sec. 67.

⁶ VIII of 1875, sec. 9.

⁷ Mad. Act VIII of 1865, sec. 32; Act XIII of 1881, secs. 56, 83(e), etc.

⁸ Civ. Proc. Code, sec. 111.

⁹ 1 Mad. H. C. 361; Code of Civil Proc., sec. 475.

¹⁰ For a definition of hypothecation, see 2 Mad. H. C. 51, followed in 3 Mad. H. C. 92. As to the Muhammadan law, 6 Ben. 54.

¹¹ Holland, 252.

¹² Sec. 109.

was not entitled to make the bailment bail them, or receive them back, or give directions respecting them¹: where the interest in immovable property which the seller, or mortgagor, or exchanger professes to transfer does not subsist, or he has no power to transfer the same²:

To quality, where provisions are sold³; where goods are sold by sample⁴, or as being of a certain denomination⁵, or where goods have been ordered for a specified purpose⁶, for which goods of the denomination mentioned in the order are usually sold: where goods are bailed *for hire*, the bailor is responsible to the bailee for damage arising to the latter from faults in the goods bailed, which 'materially interfere' with the use of them, or expose the bailee to extraordinary risks; and this whether the bailor was or was not aware of such faults⁷.

Where money is exchanged each party warrants the genuineness of the money given by him⁸.

When the transferor of a debt warrants the solvency of the debtor, the warranty (in the absence of a contract to the contrary) applies only to his solvency at the time of the contract, and is limited, where the transfer is made for consideration to the amount or value of such consideration⁹.

These are the statutory provisions as to warranty in force in India. Other cases of implied warranty are where a man purporting to act as an agent warrants his authority¹⁰; where a carrier of passengers warrants that his carriage is safe; where persons offering accommodation for persons or goods warrant the safety and sufficiency of that accommodation¹¹; and where a professional man, employed for reward, warrants that he is reasonably skilful and competent¹².

Ratification is treated by the Contract Act as only the adoption by a person as binding upon himself of an act done by another having at the time no authority to act as his agent. The rules on this matter are contained in secs. 196-200¹³. Nothing is expressly said as to the ratification which takes place when a person adopts

¹ Sec. 164.

² Act IV of 1882, secs. 55 (2), 66 (a), 120. There is no implied warranty of title on an execution sale, 4 Bom. H. C., A. C. J. 114; 6 *ibid.* 258. And even in the case of a private sale there is no implied contract, by Hindú law, that a vendor must show a good title, 2 Bom. H. C., O. C. J. 406. This is important in places in which the Transfer of Property Act is not in force.

³ Contract Act, sec. 111.

⁴ Contract Act, sec. 112.

⁵ *Ibid.* sec. 113.

⁶ *Ibid.* sec. 114.

⁷ *Ibid.* sec. 150.

⁸ Act IV of 1882, sec. 121.

⁹ Act IV of 1882, sec. 134.

¹⁰ *Gollen v. Wright*, 7 E. & B. 301: S. C. on appeal, 8 E. & B. 647.

¹¹ *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501.

¹² *Supra*, p. 516, note 2.

¹³ See also 7 Mad. H. C. 369.

as binding upon himself an act previously done by him when he was not competent to contract or when his contract has become void. But instances of this kind of ratification are in sec. 25, cl. 3, which contemplates the ratification of a contract which from lapse of time cannot be enforced, and in sec. 248, which contemplates the ratification by a partner, who had while a minor been admitted to the benefits of the partnership, of the debts incurred by the firm since his admission. Another instance is to be found in the Transfer of Property Act, sec. 127, which declares that a donee not competent to contract and accepting property burdened by an obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

There is no law in India requiring writing and signature to the ratification of a contract which from lapse of time cannot be enforced¹. Nor is there anything like 37 & 38 Vic. c. 62, which makes of no effect any promise made by a person of full age to pay any debt contracted by him during infancy, or any ratification made after majority of any promise or contract made during infancy.

The ratification by a company of particular acts done by its directors in excess of the authority given them by the articles of the company does not extend the powers of the directors so as to validate similar acts done afterwards².

Account
stated.

Account stated. The promise of repayment implied on what is called an 'account stated' is recognised in the Indian Limitation Act, XV of 1877, Sched. II, No. 64. An account is 'stated' when several items of claims are brought into account on either side, and being set against one another, a balance is struck, and the consideration for this payment of the balance is the discharge on each side³. In other words, each party resigns his own rights on the sums he can claim in consideration of a similar abandonment on the other side, and of an agreement to pay, and to receive in discharge, the balance found due⁴. It may be made by word of mouth⁵. It is akin to ratification, for the contract is superadded to a pre-existing contract by way of strengthening it; so that the creditor may rely either upon his original claim, or upon the new claim thus created, but can in no case receive more than the sum originally due⁶. The subject has been learnedly dealt by the Madras High Court⁷.

¹ See in England, 9 Geo. IV. c. 14. sec. 1, and 19 & 20 Vic. c. 97. sec. 13.

² 3 Cal. 280, 287.

³ *Laycock v. Pickles*, 33 L. J., Q. B. 43, per Lord Blackburn.

⁴ 7 Bom. 417.

⁵ *Newhall v. Holt*, 6 M. & W. 662, and see 7 Cal. 262.

⁶ Holland, 254.

⁷ 6 Mad. H. C. 197.

An I. O. U. is evidence of an account stated¹, but not of money I. O. U. lent².

Promissory notes will be considered when we come to the Negotiable Instruments Act. Promissory notes.

QUASI CONTRACTS.

This, says Sir W. Anson, is a convenient term for a multifarious class of legal relations which possess this common feature, that, without agreement and without delict or breach of duty on either side, *A* has paid something which *X* ought to pay, or *X* has received something which *A* ought to receive. The law in such cases imposes a duty upon *X* to make good to *A* the advantage to which *A* is entitled³.

The provisions of the Indian Contract Act on this subject are contained in secs. 68–73.

Section 68 deals with two cases, (a) where *X* being incompetent to contract is supplied by *A* with necessities suited to his condition in life, and (b) where *A* so supplies *Y*, whom *X* (being incompetent to contract) is 'legally' bound to support. In both cases *A* is entitled to be reimbursed from the property of *X*, but not to any personal remedy against him.

Section 69 deals with cases in which *A* allows *B* to assume such a position that *B* may be compelled by law to discharge *A*'s legal liabilities. In such cases the law implies a request by *A* to *B* to make the payment and a promise by *A* to repay *B*. Besides the case of the zamindar's tenant paying revenue-arrears, which is given as an illustration, the payment by one of several co-debtors or co-sureties of the entirety of the debt is dealt with by secs. 43 and 146. So where the mortgagees of a ship who had taken possession, paid off the wages due to the crew from the owners for the purpose of liberating her from proceedings in the Court of Admiralty⁴.

Section 70 confers a right resembling that of the Roman *negotiorum gestor*; but under the Indian law compensation is not payable unless the principal actually derives benefit from the *gestio*.

Section 71 declares generally the responsibility of the finder of goods to their owner. The rights and duties of the finder of hidden treasure are declared by Act VI of 1878.

Section 72 declares the obligation of one to whom money has been paid, or goods delivered, under coercion, or by mistake as

¹ In *Buck v. Hurst*, L. R. 1 C. P. 297, the following I. O. U. signed by debtor and surety, 'we jointly and severally owe you £60,' was held evidence of a joint account stated with creditor.

² *Fesenmeyer v. Adcock*, 16 M. & W. 449.

³ *Law of Contract*, 4th ed., p. 8.

⁴ *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38.

to the existence of a liability to make the payment or delivery ¹. The case where the payment or delivery has been procured by fraud seems to have been forgotten.

Where the obligation resulting from a quasi-contract has not been discharged, any person injured by the failure is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge the obligation and had broken his contract (sec. 73, par. 3).

The Bill which afterwards became the Contract Act was drawn in 1866 in England by the Indian Law Commissioners. In the following year it was introduced into the Council of the Governor-General during the absence of Mr. (now Sir Henry) Maine by the Right Hon. W. N. Massey, referred to a Select Committee, and published and circulated to the Local Governments. Thereupon, a controversy arose between the Secretary of State and the Commissioners on the one side, the Home and the Indian authorities on the other, as to the Commissioners' proposals that all penalties should be treated as liquidated damages, and that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith, and under circumstances which do not raise a presumption that the possessor has no right to sell them, in other words, that every place in India should become a market overt. The result was that the Secretary of State permitted the Government of India to take their own course as to altering the Bill: the Commissioners resigned; and the Bill (whose early enactment was directed by the Secretary of State) was carried through the Council, with some important amendments, by Mr. (now Sir Fitzjames) Stephen. Unfortunately it had been sent out to India in a very crude form; it never underwent the patient, penetrating revision by a skilled draftsman necessary in the case of such a measure; and though the Indian judges have loyally endeavoured to give effect to its provisions, these are so incomplete and sometimes so inaccurately worded that the time seems to have come for repealing the Act, and re-enacting it with the amendments in arrangement, wording and substance, suggested by the cases decided upon it during the last fourteen years. Should this be done it would be well to incorporate the existing laws relating to negotiable instruments, to exchanges, and to sales and mortgages and leases of immovable property, and to add chapters on Carriers and Insurance.

¹ *Marriot v. Hampton*, 2 Smith, L. C., 8th ed., 421 and notes.

THE INDIAN CONTRACT ACT, 1872.

CONTENTS.

Preamble.

PRELIMINARY.

	SECTION
Short title	1
Extent	ib.
Commencement	ib.
Enactments repealed	ib.
Interpretation-clause	2

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.

Communication, acceptance and revocation of proposals	3
Communication when complete	4
Revocation of proposals and acceptances	5
Revocation how made	6
Acceptance must be absolute	7
Acceptance by performing conditions, or receiving consideration	8
Promises, express and implied	9

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

What agreements are contracts	10
Who are competent to contract	11
What is a sound mind for the purposes of contracting	12
'Consent' defined	13
'Free consent' defined	14
'Coercion' defined	15
'Undue influence' defined.	16
'Fraud' defined	17
'Misrepresentation' defined	18
Voidability of agreements without free consent	19
Agreement void where both parties are under mistake as to matter of fact	20

	SECTION
Effect of mistakes as to law	21
Contract not voidable merely because of mistake of one party as to matter of fact	22
What considerations and objects are lawful, and what not	23

VOID AGREEMENTS.

Agreements void, if considerations and objects unlawful in part	24
Agreement without consideration, void, unless—	25
It is in writing and registered,	ib.
Or is a promise to compensate for something done,	ib.
Or is a promise to pay a debt barred by limitation law	ib.
Agreement in restraint of marriage, void	26
Agreement in restraint of trade, void	27
Saving of agreement not to carry on business of which good-will is sold	ib.
Of agreement between partners prior to dissolution	ib.
Or during continuance of partnership	ib.
Agreements in restraint of legal proceedings, void	28
Saving of contract to refer to arbitration dispute that may arise	ib.
Suits barred by such contracts	ib.
Saving of contract to refer questions that have already arisen	ib.
Agreements void for uncertainty	29
Agreements by way of wager, void	30
Exception in favour of certain prizes for horse-racing	ib.
Section 294 A of the Indian Penal Code not affected	ib.

CHAPTER III.

OF CONTINGENT CONTRACTS.

'Contingent contract' defined	31
Enforcement of contracts contingent on an event happening	32
Enforcement of contracts contingent on an event not happening	33
When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person	34
When contracts become void, which are contingent on happening of specified event within fixed time	35
When contracts may be enforced, which are contingent on specified event not happening within fixed time	ib.
Agreements contingent on impossible events, void	36

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACT.

CONTRACTS WHICH MUST BE PERFORMED.

Obligation of parties to contracts	37
Effect of refusal to accept offer of performance	38
Effect of refusal of party to perform promise wholly	39

BY WHOM CONTRACTS MUST BE PERFORMED.

	SECTION
Person by whom promise is to be performed	40
Effect of accepting performance from third person	41
Devolution of joint liabilities	42
Any one of joint promisors may be compelled to perform	43
Each promisor may compel contribution	ib.
Sharing of loss by default in contribution	ib.
Effect of release of one joint contractor	44
Devolution of joint rights	45

TIME AND PLACE FOR PERFORMANCE.

Time for performance of promise, where no time is specified and no application to be made	46
Time and place for performance of promise, where time is specified and no application to be made	47
Application for performance to be at proper time and place	48
Place for performance of promise, where no application to be made and no place fixed	49
Performance in manner or at time prescribed or sanctioned by promisee	50

PERFORMANCE OF RECIPROCAL PROMISES.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform	51
Order of performance of reciprocal promises	52
Liability of party preventing event on which contract is to take effect	53
Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises	54
Effect of failure to perform at fixed time, in contract in which time is essential	55
Effect of such failure when time is not essential	ib.
Effect of acceptance of performance at time other than that agreed upon	ib.
Agreement to do impossible act, void	56
Contract to do impossible act, or one which afterwards becomes impossible or illegal, when void	ib.
Compensation for loss on non-performance of act known to be impossible or unlawful	ib.
Where there are promises to do things legal, and also other things illegal, the former are a contract, the latter a void agreement	57
In alternative promise, one branch being illegal, legal branch alone enforceable	58

APPROPRIATION OF PAYMENTS.

Application of payment where debt to be discharged is indicated	59
Application of payment where debt to be discharged is not indicated	60
Application of payment where neither party makes appropriation	61

CONTRACTS WHICH NEED NOT BE PERFORMED.

	SECTION
Contracts changed, rescinded or altered need not be performed	62
Promisee may dispense with or remit performance of promise	63
Consequences of rescission of voidable contract	64
Obligation of person who has received advantage under void agreement, or contract that becomes void	65
Mode of communicating or revoking rescission of voidable contract	66
Effect of neglect of promisee to afford promisor reasonable facilities for performance	67

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY
CONTRACT.

Claim for necessities supplied to person incapable of contracting, or on his account	68
Reimbursement of person paying money due by another, in payment of which he is interested	69
Obligation of person enjoying benefit of non-gratuitous act	70
Responsibility of finder of goods	71
Liability of person to whom money is paid, or thing delivered, by mis- take or under coercion	72

CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

Compensation for loss or damage caused by breach of contract	73
Compensation for failure to discharge obligation resembling those created by contract	74
Title to compensation for breach of contract in which a sum is named as payable in case of breach	74
Party rightfully rescinding contract, entitled to compensation	75

CHAPTER VII.

SALE OF GOODS.

WHEN PROPERTY IN GOODS SOLD PASSES.

'Goods' defined	76
'Sale' defined	77
Sale how effected	78
Transfer of ownership of thing sold, which has yet to be ascertained, made or finished	79
Completion of sale of goods, which the seller is to put into state in which buyer is to take them	80

CONTENTS.

539

	SECTION
Completion of sale of goods, when seller has to do anything thereto in order to ascertain price	81
Completion of sale, when goods are unascertained at date of contract	82
Ascertainment of goods by subsequent appropriation	83
Ascertainment of goods by seller's selection	84
Transfer of ownership of movable property, when sold together with immovable	85
Buyer to bear loss after goods have become his property	86
Transfer of ownership of goods agreed to be sold while non-existent	87
Contract to sell and deliver, at a future day, goods not in seller's possession at date of contract	88
Determination of price not fixed by contract	89

DELIVERY.

Delivery how made	90
Effect of delivery to wharfinger or carrier	91
Effect of part-delivery	92
Seller not bound to deliver until buyer applies for delivery	93
Place of delivery	94

SELLER'S LIEN.

Seller's lien	95
Lien where payment to be made at a future day, but no time fixed for delivery	96
'Insolvency' defined	97
Seller's lien where payment to be made at a future day, and buyer allows goods to remain in seller's possession	97
Seller's lien against subsequent buyer	98

STOPPAGE IN TRANSIT.

Power of seller to stop in transit	99
When goods are to be deemed in transit	100
Continuance of right of stoppage	101
Cessation of right on assignment, by buyer, of document showing title	102
How seller may stop where instrument of title assigned to secure specific advance :	103
Stoppage how effected	104
Notice of seller's claim	105
Right of seller on stoppage	106

RESALE.

Resale on buyer's failure to perform	107
--	-----

TITLE.

Title conveyed by seller of goods to buyer	108
--	-----

WARRANTY.

	SECTION
Seller's responsibility for badness of title	109
Establishment of implied warranty of goodness or quality	110
Warranty of soundness implied on sale of provisions	111
Warranty of bulk implied on sale of goods by sample	112
Warranty implied where goods are sold as being of a certain denomination	113
Warranty where goods ordered for a specified purpose	114
Warranty on sale of article of well-known ascertained kind	115
Seller when not responsible for latent defects	116
Buyer's right on breach of warranty	117
Right of buyer on breach of warranty in respect of goods not ascertained	118

MISCELLANEOUS.

When buyer may refuse to accept, if goods not ordered are sent with goods ordered	119
Effect of wrongful refusal to accept	120
Right of seller as to rescission, on failure of buyer to pay price at time fixed	121
Sale and transfer of lots sold by auction	122
Effect of use, by seller, of pretended biddings to raise price	123

CHAPTER VIII.

OF INDEMNITY AND GUARANTEE.

'Contract of indemnity' defined	124
Rights and liabilities of indemnity-holder, when sued	125
'Contract of guarantee,' 'surety,' 'principal debtor,' and 'creditor'	126
Consideration for guarantee	127
Surety's liability	128
'Continuing guarantee'	129
Revocation of continuing guarantee	130
Revocation of continuing guarantee by surety's death	131
Liability of two persons, primarily liable, not affected by private arrangement between them as to suretyship	132
Discharge of surety by variance in terms of contract	133
Discharge of surety by release or discharge of principal debtor	134
Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor	135
Surety not discharged when agreement made with third person to give time to principal debtor	136
Creditor's forbearance to sue does not discharge surety	137
Release of one co-surety does not discharge others	138
Discharge of surety by creditor's act or omission impairing surety's eventual remedy	139
Rights of surety on payment or performance	140
Surety's right to benefit of creditor's securities	141

CONTENTS.

541

	SECTION
Guarantee obtained by misrepresentation, invalid	142
Guarantee obtained by concealment, invalid	143
Guarantee on agreement that creditor shall not act on it until co-surety joins	144
Implied promise to indemnify surety	145
Co-sureties liable to contribute equally	146
Liability of co-sureties bound in different sums	147

CHAPTER IX.

OF BAILMENT.

'Bailment,' 'bailor,' and 'bailee' defined	148
Delivery to bailee how made	149
Bailor's duty to disclose faults in goods bailed	150
Care to be taken by bailee	151
Bailee when not liable for loss, etc., of thing bailed	152
Termination of bailment by bailee's act inconsistent with conditions	153
Liability of bailee making unauthorized use of goods bailed	154
Effect of mixture, with bailor's consent, of his goods with goods of bailee	155
Effect of mixture, without bailor's consent, when the goods can be separated	156
Effect of mixture, without bailor's consent, when the goods cannot be separated	157
Re-payment, by bailor, of necessary expenses	158
Restoration of goods bailed gratuitously	159
Return of goods bailed, on expiration of time or accomplishment of purpose	160
Bailee's responsibility when goods are not duly delivered or tendered	161
Termination of gratuitous bailment by death	162
Bailor entitled to increase or profit from goods bailed	163
Bailor's responsibility to bailee	164
Bailment by several joint owners	165
Bailee not responsible on re-delivery to bailor without title	166
Right of third person claiming goods bailed	167
Right of finder of goods	168
May sue for specific reward offered	ib.
When finder of thing commonly on sale may sell it	169
Bailee's particular lien	170
General lien of bankers, factors, wharfingers, attorneys and policy-brokers	171

BAILMENTS OF PLEDGES.

'Pledge,' 'pawnor,' and 'pawnee' defined	172
Pawnee's right of retainer	173
Pawnee not to retain for debt or promise other than that for which goods pledged	174
Presumption in case of subsequent advances	ib.
Pawnee's right as to extraordinary expenses incurred	175

	SECTION
Pawnee's right where pawnor makes default	176
Defaulting pawnor's right to redeem	177
Pledge by possessor of goods, or of documentary title to goods	178
Pledge where pawnor has only a limited interest	179

SUITS BY BAILLEES OR BAILORS AGAINST WRONG-DOERS.

Suit by bailor or bailee against wrong-doer	180
Apportionment of relief or compensation obtained by such suits	181

CHAPTER X.

AGENCY.

APPOINTMENT AND AUTHORITY OF AGENTS.

'Agent' and 'principal' defined	182
Who may employ agent	183
Who may be an agent	184
Consideration not necessary	185
Agent's authority may be expressed or implied	186
Definitions of express and implied authority	187
Extent of agent's authority	188
Agent's authority in an emergency	189

SUB-AGENTS.

When agent cannot delegate	190
'Sub-agent' defined	191
Representation of principal by sub-agent properly appointed	192
Agent's responsibility for sub-agent	ib.
Sub-agent's responsibility	ib.
Agent's responsibility for sub-agent appointed without authority	193
Relation between principal and person duly appointed by agent to act in business of agency	194
Agent's duty in naming such person	195

RATIFICATION.

Right of person as to acts done for him without his authority	196
Effect of ratification	ib.
Ratification may be expressed or implied	197
Knowledge requisite to valid ratification	198
Effect of ratifying unauthorised act forming part of a transaction	199
Ratification of unauthorised act cannot injure third person	200

REVOCATION OF AUTHORITY.

Termination of agency	201
Termination of agency, where agent has an interest in subject-matter	202
When principal may revoke agent's authority	203
Revocation where authority has been partly exercised	204
Compensation for revocation by principal, or renunciation by agent	205

	SECTION
Notice of revocation or renunciation	206
Revocation and renunciation may be expressed or implied	207
When termination of agent's authority takes effect as to agent, and as to third persons	208
Agent's duty on termination of agency by principal's death or insanity	209
Termination of sub-agent's authority	210

AGENT'S DUTY TO PRINCIPAL.

Agent's duty in conducting principal's business	211
Skill and diligence required from agent	212
Agent's accounts	213
Agent's duty to communicate with principal	214
Right of principal when agent deals, on his own account, in business of agency without principal's consent	215
Principal's right to benefit gained by agent dealing on his own account in business of agency	216
Agent's right of retainer out of sums received on principal's account	217
Agent's duty to pay sums received for principal	218
When agent's remuneration becomes due	219
Agent not entitled to remuneration for business misconducted	220
Agent's lien on principal's goods and papers	221

PRINCIPAL'S DUTY TO AGENT.

Agent to be indemnified against consequences of lawful acts	222
Agent to be indemnified against consequences of acts done in good faith	223
Non-liability of employer of agent to do a criminal act	224
Compensation to agent for injury caused by principal's neglect	225

EFFECT OF AGENCY ON CONTRACTS WITH THIRD PERSONS.

Enforcement and consequences of agent's contracts	226
Principal how far bound, when agent exceeds authority	227
Principal not bound when excess of agent's authority is not separable	228
Consequences of notice given to agent	229
Agent cannot personally enforce, nor be bound by, contracts on behalf of principal	230
Presumption of contract to contrary	ib.
Rights of parties to a contract made by agent not disclosed	231
Performance of contract with agent supposed to be principal	232
Right of person dealing with agent personally liable	233
Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable	234
Liability of pretended agent	235
Person falsely contracting as agent, not entitled to performance	236
Liability of principal inducing belief that agent's unauthorised acts were authorised	237
Effect, on agreement, of misrepresentation or fraud by agent	238

CHAPTER XI.

OF PARTNERSHIP.

	SECTION
'Partnership' defined	239
'Firm' defined	ib.
Lender not a partner by advancing money for share of profits	240
Property left in business by retiring partner, or deceased partner's representative	241
Servant or agent remunerated by share of profits, not a partner	242
Widow or child of deceased partner receiving annuity out of profits, not a partner	243
Person receiving portion of profits for sale of good-will, not a partner	244
Responsibility of person leading another to believe him a partner	245
Liability of person permitting himself to be represented as a partner	246
Minor partner not personally liable, but his share is	247
Liability of minor partner on attaining majority	248
Partner's liability for debts of partnership	249
Partner's liability to third person for neglect or fraud of co-partner	250
Partner's power to bind co-partners	251
Annulment of contract defining partners' rights and obligations	252
Rules determining partners' mutual relations, where no contract to contrary	253
When Court may dissolve partnership	254
Dissolution of partnership by prohibition of business	255
Rights and obligations of partners in partnership continued after expiry of term for which it was entered into	256
General duties of partners	257
Account, to firm, of benefit derived from transaction affecting partnership	258
Obligations, to firm, of partner carrying on competing business	259
Revocation of continuing guarantee by change in firm	260
Non-liability of deceased partner's estate for subsequent obligations	261
Payment of partnership-debts, and of separate debts	262
Continuance of partners' rights and obligations after dissolution	263
Notice of dissolution	264
Right of partners to apply for winding-up by Court after termination of partnership	265
Limited liability partnerships, incorporated partnerships, and joint stock companies	266
SCHEDULE. Enactments repealed	ib.

ACT No. IX OF 1872.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 25th April,
1872.)

The Indian Contract Act, 1872.

Whereas it is expedient to define and amend certain parts Preamble.
of the law relating to contracts¹; It is hereby enacted as
follows:—

PRELIMINARY.

1. This Act may be called 'The Indian Contract Act, Short title.
1872.'

It extends to the whole of British India; and it shall come Extent.
into force on the first day of September, 1872². Commence-
ment.

The enactments mentioned in the schedule hereto are re- Enact-
pealed to the extent specified in the third column thereof; but ments
nothing herein contained shall affect the provisions of any repealed.
Statute³, Act⁴, or Regulation⁵ not hereby expressly repealed,

¹ The Act is and purports to be
only a partial measure, 3 Bom. 113:
10 Cal. 184.

² i.e. as to contracts entered into,
after that day. That Act IX of 1872
has no retrospective effect, see 12 Ben.
458: 5 Moo. L. A. 109, 127.

³ For instance, 21 Geo. III. c. 70.
sec. 17, and 37 Geo. III. c. 142. sec. 13,
which leaves suits in the late Supreme
Courts on contracts 'where only one
of the parties shall be a Muhamma-
dan or Gentu' to be determined 'by
the laws and usages of the defendant'
(see 5 Ben. 639, 643: 12 Suth., App.
O. J. 11: but in 14 Ben. 76, 85
Couch C.J. ruled that, notwith-
standing 21 Geo. III. c. 70, the
Contract Act applies to Hindús in

Calcutta): 17 & 18 Vic. c. 104.
sec. 544, as to contracts with lascars
or native seamen: 21 & 22 Vic. c.
106. secs. 39, 67, as to contracts of
the late E. I. Company, *ibid.* sec. 40:
contracts of the Secretary of State
in Council, *ibid.* sec. 40, and 22 & 23
Vic. c. 41. ss. 2, 5.

⁴ See, for instance, Acts XXXII
of 1839 (interest), XXVIII of 1855
(usury), IX of 1856 (bills of lading),
XIII of 1859 (breaches of contract
by artificers, etc.), XLV of 1860,
chap. xix, *supra* p. 279, III of 1865
(common carriers), and the other
Acts mentioned in the note to sec. 10
infra.

⁵ There seem no unrepealed Regu-
lations which this clause would save.

nor any usage or custom of trade¹, nor any incident of any contract, not inconsistent with the provisions of this Act².

Inter-
pretation-
clause³.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

‘Proposal.’ (a.)—When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

‘Promise.’ (b.)—When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise⁴:

‘Promisor and ‘promisee.’ (c.)—The person making the proposal is called the ‘promisor,’ and the person accepting the proposal is called the ‘promisee:’

‘Consideration.’ (d.)—When, at the desire of the promisor, the promisee or any other person⁵ has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something⁶, such act or abstinence or promise is called a consideration for the promise⁷:

¹ e.g. the customary law relating to common carriers, 10 Cal. 184, 185 (dissenting from 3 Bom. 109): the rules relating to the liens of attorneys, 6 Cal. 1: the rule of Hindú law (*dāmdupat*) that arrears of interest exceeding in amount the principal debt are not recoverable at any one time, 9 Bom. H. C. 83; 1 Bom. H. C., A. C. J. 47; 3 *ibid.* 25; 9 *ibid.* 83: but see 1 Cal. 92. In 5 Cal. 868 Wilson J. thought the rule that ‘arrears of interest more than sufficient to double the debt are not recoverable’ one of limitation rather than of contract.

But the custom must be reasonable: the courts therefore will not enforce a custom allowing a broker to deviate from his instructions, 8 Bom. H. C., A. C. J. 19.

As to the origin and binding force of customary law, see 3 Mad. H. C. 50, per Holloway J. And as to the evidence necessary to establish a valid custom or usage, 4 Bom. H. C., A. C. J. 113; 11 Bom. 270.

² The words ‘not inconsistent’ etc. apply to ‘any usage or custom of

trade,’ as well as to ‘any incident of any contract,’ 14 Ben. 76, 84, 85. Quaere therefore whether the rule that the obligation on a bill of exchange or promissory note may be raised without consideration is still in force in India.

³ See also the General Clauses Act, *supra*, p. 487.

⁴ According to this definition, taken with that of proposal, the scope of promises is confined to conduct on the part of the promisor.

⁵ 4 Mad. 137 (when A granted a share in a zamindari to B and directed B to make an annual payment to C, and B, by a contemporaneous agreement with C, promised to carry out A’s direction), 6 Mad. 354, 355. For an instance in which an expenditure was held not to be a consideration, see 3 All. 221.

⁶ Words are wanted to show that the consideration must be of some value. The following are suggested: ‘and the promisee or such other person did or does thereby undertake some burden or lose some thing which in contemplation of law may be of value.’ See Pollock, *Contract*, 167.

⁷ The Indian Act keeps the doubt-

(e.)—Every promise and every set of promises, forming the ‘Agreement.’
consideration for each other, is an agreement :

(f.)—Promises which form the consideration or part of the ‘Reciprocal promises.’
consideration for each other, are called reciprocal promises :

(g.)—An agreement not enforceable by law is said to be ‘Void agreement.’
void :

(h.)—An agreement enforceable by law is a contract : ‘Contract.’

(i.)—An agreement which is enforceable by law at the ‘Voidable contract.’
option of one or more of the parties thereto, but not at the
option of the other or others, is a voidable contract :

(j.)—A contract which ceases to be enforceable by law be- ‘Void contract.’
comes void when it ceases to be enforceable ¹.

ful doctrine that a consideration executed on actual request will support a subsequent express promise, Pollock, *Contract*, 4th ed. 172.

¹ Better say: ‘A contract which ceases to be enforceable by law at the suit of a party thereto becomes

a void agreement when it ceases to be so enforceable.’ This enactment is qualified by sec. 25, clause 3, *infra*, which treats a time-barred debt as a good consideration for a fresh promise in writing to pay such debt, 5 Bom. 650.

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.

Communi-
cation,
acceptance
and revo-
cation of
proposals.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communi-
cation
when com-
plete.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer¹.

The communication of a revocation is complete,

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

¹ Here, as elsewhere in this Act, the definitions have not been borne in mind. A 'proposal' when accepted becomes a 'promise' (sec. 2, cl. b). Every 'promise' is an 'agreement' (sec. 2, cl. c). All 'agreements' are 'contracts' if they are made in ac-

cordance with sec. 10. A 'contract' is enforceable by law (sec. 2, cl. h). Therefore a suit would lie against an 'acceptor' even before his acceptance comes to the knowledge of the proposer—which is contrary to the intention of sec. 4.

Illustrations.

(a) *A* proposes, by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete,

as against *A* when the letter is posted;

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him¹.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Revocation of proposals and acceptances.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations.

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

6. A proposal is revoked—

Revocation how made.

(1) by the communication of notice of revocation by the proposer to the other party;

¹ What of an acceptance that does not arrive at all? The letter of the text seems to lead to the conclusion of *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; but the spirit of Illustration (c) looks the other way, Pollock, 638. It seems to me that text and illustration are here harmonious, and lay down a rule differing from that approved by the majority of the judges in the case cited.

The illustrations to secs. 4 and 5 and the beginning of sec. 226 show that it is not necessary that the parties shall be face to face at the time. They may communicate by letter, telegram, messenger or agent; and a person who at the time had no authority to act for another may be retrospectively made his agent by subsequent ratification (see *infra*, sec. 196).

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance¹;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance².

Acceptance
must be
absolute.

7. In order to convert a proposal into a promise the acceptance must—

(1) be absolute and unqualified³;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance⁴.

Acceptance
by per-
forming
conditions,
or receiving
considera-
tion.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise⁵ which may be offered with a proposal, is an acceptance of the proposal.

¹ This seems intended, notwithstanding the unqualified language of sec. 5, to cover the case of an acceptance sent by post being lost or seriously delayed, Pollock, 639.

² The words 'or insanity,' and 'if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance,' do not represent English law, Pollock, 639.

A proposal is revoked, *fifthly*, by the death of the person to whom it is made before acceptance. It cannot be accepted by his representatives, Leake, *Digest*, 47, citing *Werner v. Humphreys*, 2 M. & G. 853.

³ for unless and until there is such acceptance, there is at most proposals and counter-proposals, Pollock, 38.

⁴ Compare *Leathercloth Co. v.*

Hieronimus, L. R. 10 Q. B. 140. There goods were ordered to be sent by an unusual route for a special reason: the reason ceased to exist before the order could be executed, and the goods were sent by the usual route. Held that this being acquiesced in by the buyer, was a sufficient performance of the original contract, and not of a substituted contract; and therefore no special memorandum of such alleged substituted contract was required to satisfy the Statute of Frauds, Pollock, *Contract*, 639.

⁵ Here again the definitions seem to have been forgotten. If the explanation of 'reciprocal promises' (sec. 2, cl. f) is here substituted, sec. 8 becomes meaningless.

9. In so far as the proposal or acceptance of any promise is made in words¹, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words¹, the promise is said to be implied².

¹ or signs?

² The meaning probably is that where (or so far as) a proposal or acceptance is inferred from a course of

conduct, the promise is said to be 'implied': in other cases it is 'express'.

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

What agreements are contracts.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing¹ or in the presence of witnesses, or any law relating to the registration of documents².

Who are competent to contract.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject³, and

¹ See the enactments relating to the following subjects:—

Apprenticeship-contracts, Act XIX of 1850, secs. 8, 11, 12, 19; Arbitration, reference to, VI of 1882, sec. 96; XIV of 1882, sec. 523; Mad. Regs. IV of 1816, sec. 27; V of 1816, sec. 4; Canal-water Companies, VIII of 1873, secs. 31, 32; Ben. Act III of 1876, secs. 74, 75; VI of 1882, secs. 6, 67; Copyright, 5 & 6 Vic. c. 45, sec. 13, and Act XX of 1847, sec. 5; Decrees, assignments of, XIV of 1882, sec. 232; Emigration, XXI of 1883, sec. 35; I of 1882, sec. 9; Immovable property, IV of 1882, secs. 54, 59, 107, 123; XVII of 1879, sec. 70; Landlord and tenant, VIII of 1885, sec. 25, cl. (a), 43, 46; XIX of 1868, secs. 4, 32, 36, 48; XXVIII of 1868, sec. 2; XII of 1881, sec. 12; Mad. Act VIII of 1865, sec. 7, and other local enactments; Merchant seamen, I of 1859, secs. 22, 23; IV of 1875, secs. 24-27; Municipalities, Ben. Act IV of 1876, sec. 54, and other local municipal

Acts; Negotiable Instruments, XXVI of 1881; Port-Commissioners and trustees, Ben. Act V of 1870, sec. 37, and other local Acts; Presidency banks, XI of 1876, sec. 9; Railway Companies, IV of 1879, sec. 10; Se-
poys, XI of 1841, sec. 9.

See besides, in the Indian Contract Act, sec. 25 (1), agreements on account of natural affection, 25 (3), agreements to pay time-barred debts, and sec. 28, expl. (2).

² See Act III of 1877, secs. 49, 50.

³ i.e. his own personal law, 7 All. 500. As to persons domiciled in British India, see Act IX of 1875, which declares that minority lasts until the completion of the eighteenth year, except in the case of persons who have guardians appointed for them by a Court, or are under the charge of the Court of Wards; in their case majority not attained until the completion of the twenty-first year. See as to this Act 3 Mad. 11; 1 Cal. 388; and 3 All. 598.

who is of sound mind, and is not disqualified from contracting by any law to which he is subject ¹.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. Sound mind for purposes of contracting.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind ².

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts ³.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense. ‘Consent’ defined.

14. Consent is said to be free when it is not caused by— ‘Free consent’ defined.

- (1) coercion, as defined in section fifteen, or
- (2) undue influence, as defined in section sixteen, or
- (3) fraud, as defined in section seventeen, or
- (4) misrepresentation, as defined in section eighteen, or
- (5) mistake, subject to the provisions of sections twenty, twenty-one and twenty-two.

¹ As to contracts by Hindú women, see 1 Bom. 123. A married Hindú woman may contract jointly with her husband; but she is then liable only to the extent of her *stridhana*, 6 Bom. 473. It has been held that a minor may be a mortgagee, 3 All. 408; but this is the opinion of Stuart, C.J. As to minors becoming partners, see secs. 247, 248, *infra*. As to minors accepting property burdened by an obligation, see the Transfer of Property Act, *infra*, sec. 127.

² This must be read in connection with sec. 65, *infra*. The possibility

of hardship to persons who have dealt in good faith with a lunatic who was apparently sane, is, it would seem, disregarded by the Indian Act as being in practice exceedingly small; and the liability of a lunatic to pay for necessaries is laid down in sec. 68, Pollock, 95.

³ Contracts by a person in a state of drunkenness are wholly void. In England they are only voidable, and may be ratified when the contractor is sober, *Matthews v. Baxter*, L. R. 8 Ex. 132.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

'Coercion'
defined.

15. 'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement¹.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code².

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done³.

'Undue
influence'
defined.

16. 'Undue influence' is said to be employed in the following cases :—

(1.)—When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained :

(2.)—When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion⁴.

¹ This goes far beyond English law, for it does not require that the coercion should be exercised by, or even known to, the other party, nor that the person coerced should be the party whose consent is to be obtained, or in any way related to him, Pollock, 701.

² See above, p. 290.

³ And see L. R. 3 I. A. 61, where the Judicial Committee held that

imprisonment on a criminal charge in a country (e.g. Siam), where there is no settled system of law or procedure, and where the judge has arbitrary powers, is duress which will void a contract made under such circumstances.

⁴ The following illustrations of this section were contained in the bill as drafted—

(a) *A*, a young woman who has

17. 'Fraud' means and includes any of the following ^{'Fraud' defined.} acts committed by a party to a contract¹, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1.)—The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;

(2.)—The active concealment of a fact by one having knowledge or belief of the fact ;

(3.)—A promise made without any intention of performing it ;

(4.)—Any other act fitted to deceive ;

(5.)—Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—'If you do not deny it, I shall assume that the horse is sound ;' *A* says nothing. Here, *A*'s silence is equivalent to speech.

resided during her minority in the family of *B*, her guardian, continues to reside with him after attaining majority, and is induced, by means of his influence, to enter into a contract with him which is disadvantageous to herself. *B* employs undue influence.

(b) *A*, having advanced money to his son, *B*, during his minority, upon *B*'s coming of age obtains, by parental influence, a bond from *B*, for a greater amount than the sum due upon the advance. *A* employs undue influence.

(c) *A* is induced, by *B*'s influence over him as his legal adviser, to convey an estate to *B* for his benefit. *B* employs undue influence.

(d) *A*, a man enfeebled by disease or age, is induced by *B*'s influence over him as his medical attendant to agree to pay *B* an unreasonable sum for his professional assistance during the rest of *A*'s life. *B* employs undue influence.

¹ This should be 'agreement': see sec. 2, cl. (k).

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*¹.

'Misrepresentation' defined.

18. 'Misrepresentation' means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him²;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement³.

Voidability of agreements without free consent.

19. When consent to an agreement is caused by coercion, undue influence, fraud⁴ or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused⁵.

A party to a contract, whose consent was caused by fraud⁴ or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true⁶.

¹ This adopts a decision of the Supreme Court of the United States in *Laidlaw v. Organ*, 2 Wheaton, 178, where the contract was a sale of tobacco. On the morning of the sale the buyers knew, but the sellers did not know, that peace had been concluded between the United States and England. The sellers asked if there was any news affecting the market-price. The buyers gave no answer, and the sellers did not insist on having one, and it was held that the silence of the buyers was not a fraudulent concealment. Silence in such a case is only equivalent to saying, 'It is not our business to tell you,' Pollock, 515. See also *Smith v. Hughes*, L. R. 6 Q. B. 597.

² 3 Bom. 242, 267. This sub-section seems hardly in place here. The

framers of the draft Civil Code of New York, from which it is taken (§ 758), appear to have generalised from *Bulkley v. Wilford*, 2 Cl. & F. 102. That case, however, proceeds rather on the special duty of an agent; and the *ratio decidendi* is expressly that a professional agent shall not take advantage of his own ignorance. There was also evidence and a finding of actual fraud, Pollock, 702.

³ 5 Bom. 92. It is hard to say what this sub-section applies to. See sec. 13 and the expl. to sec. 17.

⁴ As to causing consent by 'fraud,' see sec. 14, last para.

⁵ 6 N. W. P. 350.

⁶ See the circumstances under which specific performance can be obtained, Specific Relief Act, secs.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section seventeen, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence¹.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which shows that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from incumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on on its being carried out and the mortgage-debt redeemed².

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*; *B* dies: *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void³.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

Agreement void where both parties are under mistake as to matters of fact.

12-18. As to the Court's discretion to refuse specific performance, though there may be no fraud or misrepresentation on the plaintiff's part, *ibid.* secs. 22-26.

¹ 3 Bom. 242; 5 Bom. 98.

² Here 'redeemed' probably means 'paid off.'

³ 3 Cal. 602; 6 Cal. 706.

Illustrations.

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void ¹.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void ².

(c) *A*, being entitled to an estate for the life of *B*³, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void ⁴.

Effect of
mistakes as
to law.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact ⁵.

Illustrations.

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

A and *B* make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France: the contract is voidable ⁶.

Mistake of
one party
as to fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact ⁷.

¹ This was assumed in *Conturier v. Hastie*, 5 H. L. C. 673.

² Pothier, *Contrat de Vente*, pt. 1, sec. 2, art. 1, cited 5 H. L. C. 678. So the Code Civil, 1601. Mr. Pollock (*Contract*, p. 442) adds a like example from the Digest: *A* agrees with *B* to buy a house belonging to *B*. The house has been burnt down, but neither *A* nor *B* knows it. Here there is not a contract for the sale of the land on which the house stood, with compensation or otherwise: but the sale is void. Compare the Specific Relief Act, I of 1877, sec. 21, cl. (h).

³ or to an annuity depending on the life of *B*, *Strickland v. Turner*, 7 Ex. 208.

⁴ So where *A* agrees to sell to *B* shares in a certain company, and a

petition for winding up the company had been presented at the time of the agreement, but both parties were ignorant of the fact, the agreement is not enforceable against *B*, *Emmerson's Case*, L. R. 1 Ch. App. 433. So where *A* having a right to an estate, purchases it of *B*, both parties being ignorant of *A*'s right.

⁵ See the Evidence Act, sec. 38.

⁶ If, as seems to be intended, the French law is 'a matter of fact essential to the agreement,' the contract is not 'voidable,' but 'void,' sec. 20.

⁷ 'Nothing is said as to the time within which a voidable contract must be rescinded,' Pollock, 702, 703. See the Limitation Act, XV of 1877, Sched. II, art. 114.

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law¹; or

is of such a nature that, if permitted, it would defeat the provisions of any law²; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral³, or opposed to public policy⁴.

What
considerations
and
objects are
lawful.

¹ See secs. 26 and 30 *infra*. A thing is 'forbidden by law' when the law imposes a penalty for doing or omitting to do it, as the case may be. That 'law' here means a legislative enactment seems to follow from *ill. (i)*. In 7 Mad. 301, it was held that money lent in the Madras Mufassal for the purpose of gambling there might be recovered.

² not necessarily a legislative enactment. This applies to an agreement by *A* to become surety for *B*'s good behaviour on condition that *B* deposited with *A* the amount of the security, 1 All. 751: to a mortgage made without the sanction of the Court by a guardian who has obtained a certificate under Act XL of 1858, 2 All. 902: to an agreement to repay money paid for the purpose of bribing a darogah, 9 Ben. Appx. 38: to an agreement to pay a tax prohibited by the legislature, 8 Bom. 398: to an agreement to give a son in adoption in consideration of an annual allowance to his natural parents, 13 Ben. Appx. 42; but not to an uncertified adjustment of a decree out of court (Act XIV of 1882, sec. 258), 7 All. 132; nor to an agreement whereby a judgment-debtor obtained the release of property attached for a sum not awarded on condition of paying by instalments the whole sum, 3 Cal. 602; nor to a sale of land pending a suit against the vendor for a debt, though his motive was to prevent the land being attached, 5 Mad. H. C. 368. A karnavan cannot part, by agreement, so as to be unable to resume them, with the privileges and duties which attach

to his position as such, 6 Mad. H. C. 145.

³ As to setting aside hard bargains, L. R. 12 Ind. App. 215, following *Beynon v. Cook*, L. R. 10 Ch. App. 391. That a Hindú landlord cannot recover the rent of lodgings knowingly let to a Hindú prostitute who carries on her vocation there, see 9 Ben. Appx. 37. An agreement by *A* to pay money to *B* on the consideration that *B* will give in a civil suit favourable evidence (either true or false) on behalf of *A* is vicious, 4 Mad. H. C. 7. So is an agreement tending to bring about a divorce between Hindús even though they belong to a caste in which the marriage-tie is loose, 10 Bom. 152.

⁴ Agreement by Hindús to remain subject to the orders of the head of their caste and not to carry on their trade with the assistance of persons not members of that caste, 2 Mad. 44. Agreement to pay money in consideration of foregoing a criminal prosecution, 2 Mad. H. C. 187. Agreement between client and vakíl for reward depending upon the fruits of victory, 10 Bom. H. C. 33. Agreement between a servant and his master's broker, inconsistent with relations of master and servant, 7 Bom. H. C., O. C. J. 90. Agreement by Hindús that upon the happening of a certain event a marriage is to become null and void, 11 Ben. 129. As to marriage-brocage contracts, see 10 Cal. 1056. Semble the English rule would not apply to Hindús, as in their case the consent of the parties has rarely, if ever, anything to do with the mar-

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful¹, is void².

Illustrations.

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here, *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 1000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here, *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child, and *B* promises to pay *A* 1000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1000 rupees to *A*. The agreement is void, as the consideration for it is unlawful³.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A*

riage contract. That future, not past, cohabitation is an immoral consideration, see 1 All. 478, 480. As to purchase of actionable claims, 5 Cal. 4 and Act IV of 1882, chap. 8. As to contracts of the nature of maintenance and champerty, L. R. 1 I. A. 241; L. R. 4 I. A. 23; (S. C. 2 Cal. 233); 1 Ben. Short Notes, x; 7 Mad. H. C. 128; 8 Bom. H. C. 1. As to the mutual incapacity of advocate and client to contract concerning advocacy in litigation, see 4 Mad. H. C. 244; 3 N. W. P. 83. That an agreement between two members of a pátál family to officiate in turns is not

illegal, see 6 Bom. H. C., A. C. J. 243.

¹ As to partial illegality, see secs. 27, 28, 57, 58.

² This section does not render void a sale made with the view of defeating a probable execution. A creditor without a specific lien has no *a priori* right to debar his debtor from parting with his immovable property until it is attached in due course of law, 4 Bom. 71; and see 5 Mad. H. C. 368.

³ 49 Geo. III. c. 126. sec. 3 is in force at all events in the Presidency Towns.

and *B* is void, as it implies a fraud by concealment, by *A*, on his principal¹.

(*h*) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful².

(*i*) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(*j*) *A*, who is *B*'s mukhtár, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1000 rupees to *A*. The agreement is void, because it is immoral.

(*k*) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code³.

VOID AGREEMENTS.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void⁴.

Illustration.

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void,

Agreements void, if considerations and objects unlawful in part.

¹ But *A* would be bound to restore the money to *B*. See sec. 65 infra. This illustration seems to relate to the words 'is fraudulent' of the text.

² See the Cr. P. Code, sec. 345, where the only offences which can be compounded are mentioned.

³ No illustrations are given on the head of public policy. An agreement for the compounding or suppression of [the prosecution for] a crime of a public nature, e.g. theft, committed within British India would be invalid on both the grounds of its being contrary to public policy and *malum prohibitum* by legislative enactment (Penal Code, secs. 213, 214). But this has no application to a contract

for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, the law of that country permitting such a transaction, 4 Mad. H. C. 17. An agreement between two members of a pátíl family that they are to officiate in turns is not void as being opposed to public policy, 6 Bom. H. C., A. C. J. 243.

⁴ See secs. 57, 58 infra. Sec. 24 seems to have been intended to exclude the practice of enforcing a partly illegal contract so far as it is not illegal. But some judges have taken a different view. See 9 Ben. 441, per Couch C. J., and 15 Ben. App. 5.

the object of A's promise, and the consideration for B's promise, being in part unlawful.

Agreement without consideration, void, unless it is in writing and registered, 25. An agreement made without consideration¹ is void, unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of assurances, and is made on account of natural love and affection between parties standing in a near relation to each other²; or unless

(2) it is a promise³ to compensate, wholly or in part, a person who has already voluntarily⁴ done something for the promisor⁵, or something which the promisor was legally compellable to do⁶, or unless

(3) it is a promise, made in writing⁷ and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt⁸ of which the creditor might have enforced payment but for the law for the limitation of suits⁹.

In any of these cases, such an agreement is a contract.

¹ See sec. 2 (d). For instances of an agreement held *nudum pactum*, see 2 Bom. 362; 1 All. 309; 5 Bom. H. C., A. C. J. 37. An agreement not to do that which is morally wrong [e.g. not to shut out evidence to which one of the parties is entitled] can scarcely be said to be a consideration, 4 Mad. H. C. 9. As to promises of rewards to constables and seamen, 4 Mad. H. C. 8. That the performance of a legal duty (e.g. to attend Court and give evidence) is no consideration, *ibid*. On the other hand, it has been held that a mutual agreement to avoid further litigation is not void as being without consideration, 5 Bom. H. C., A. C. J. 75.

² e.g. a written agreement between a Muhammadan and his wife to pay her his earnings, 15 Ben. Appx. 5. A written agreement between a member of an undivided Hindú family and the other copartners to renounce in their favour his right to the family property, is valid if registered, and if the motive were really natural love and affection, 6 Mad. 73. So under this section a duly registered gift by a Hindú to his son would apparently bind the father and his representa-

tives without delivery of possession, West & B. 686. Promises deliberately made by the father are by the Hindú law regarded as equally binding on his sons, especially if made to his wife, West & B. 161, and see secs. 191, 193, 195.

³ express or implied, sec. 9.

⁴ This should be 'otherwise than at the desire of the promisor' (see sec. 2, cl. d).

⁵ 3 All. 787 (past cohabitation).

⁶ 3 All. 221, 228.

⁷ not a mere acknowledgment, 8 Bom. 195, like the Guzaráti words *baki devá* ('balance due'), 8 Bom. 407: nor the bare statement of an account, 6 Bom. 685.

⁸ 'Debt' here includes a judgment debt, 3 All. 781; 4 Cal. 500. The promise must be to pay a specified debt which would otherwise be barred.

⁹ 4 Cal. 500. A debt due on a decree is a sufficient consideration for a promissory note, though, when the note was made, execution of the decree was barred by limitation, 6 N. W. P. 150. As to the reason for upholding a promise to pay a time-barred debt, see 10 Bom. H. C. 206.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given¹.

Illustrations.

(a) *A* promises, for no consideration, to give to *B* Rs. 1000. This is a void agreement².

(b) *A* for natural love and affection, promises to give his son, *B*, Rs. 1000. *A* puts his promise to *B* into writing and registers it. This is a contract.

(c) *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(d) *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract.

(e) *A* owes *B* Rs. 1000, but the debt³ is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) *A* agrees to sell a horse worth Rs. 1000 for Rs. 10. *A*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) *A* agrees to sell a horse worth Rs. 1000 for Rs. 10. *A* denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A*'s consent was freely given.

26. Every agreement in restraint of the marriage of any person, other than a minor⁴, is void. Agreement in restraint of marriage.

27. Every agreement by which any one is restrained⁵ from Agreement in restraint of trade.

¹ This is the true doctrine, Pollock, 575. See *Harrison v. Guest*, 6 D. M. G. 424; 8 H. L. C. 481, where a sale made by a person of inferior station and for an inadequate price was upheld, the evidence showing that the vendor had entered into the transaction deliberately, and had deliberately chosen not to take independent professional advice. There was no fiduciary relation between them. Compare the Specific Relief Act, *infra*, sec. 28, cl. (a).

² It is said that a subsequent promise by one member of a joint

Hindú family to pay the individual debt of another member, previously contracted, would bind him. But such a promise would now be held invalid for want of consideration, Mayne, H. L. sec. 287.

³ i.e. the remedy by suit for the debt.

⁴ i.e. other than a minor *during his or her minority*. As the section is worded, an agreement in restraint of *A*'s marriage at any time would be valid if *A* were a minor at the date of the agreement.

⁵ absolutely or partially, 14 Ben. 76; 11 Cal. 549.

exercising a lawful profession, trade or business of any kind, is to that extent void ¹.

Agreement not to carry on business of which good-will is sold; *Exception 1.*—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business ².

Agreement between partners prior to dissolution; *Exception 2.*—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception ³.

or during continuance of partnership. *Exception 3.*—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

Agreements in restraint of legal proceedings, void. **28.** Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract ⁴, by the usual legal proceedings in the ordinary tribunals ⁵, or which limits the time within which he may thus enforce his rights, is void to that extent.

¹ A contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer is bad under this section, 11 Cal. 545. A stipulation in a contract prohibiting any sales of goods of a certain description to others during three months after the date of the contract is not void under this section, 8 Cal. 809. But an agreement binding certain Hindú workers in lead not to carry on their trade with the assistance of any persons not belonging to their own caste is void, 2 Mad. 44. An agreement in restraint of trade to be performed in India entered into out of India, though valid by the *lex loci contractus*, is void in India. A contract made in country A for the purpose of contravening the laws of country B within B cannot be enforced by the Courts of B, 1 Mad. 134.

² See an instance, 4 Mad. H. C. 77.

³ There is no limitation as to the time for which this negative service is to continue.

⁴ This does not include rights under a decree, 7 All. 131. And sec. 28 does not prohibit an agreement, for good consideration, not to appeal against a decree, 1 All. 267, following the decision of the Judicial Committee in 9 Ben. 460. It cannot be supposed to invalidate compromises, covenants to suspend rights of action, or covenants not to sue at all, Cunn. & Shepp. 140. It seems directed against agreements containing a stipulation that no suit shall be brought upon them, 4 Mad. H. C. 123.

⁵ See 1 Agra 129, where the parties agreed that questions arising on certain bills of lading should be heard in Calcutta by the High Court, the proper tribunal being at Matra or Mirzapur.

Exception 1.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred ¹.

Saving of contract to refer to arbitration dispute that may arise.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration ².

Saving of contract to refer questions that have already arisen.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void ³.

Agreements void for uncertainty.

Illustrations.

(a) *A* agrees to sell to *B* 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in cocoanut-oil only, agrees to sell to *B* 'one hundred tons of oil.' The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) *A* agrees to sell to *B* 'all the grain in my granary at Rāmāgar.' There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* 'one thousand maunds of rice at a price to be fixed by *C*.' As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* 'my white horse for rupees five hundred or rupees one thousand.' There is nothing to show which of the two prices was to be given. The agreement is void ⁴.

¹ 1 Cal. 42, 466; 11 Cal. 232; *London Tramways Co. v. Bailey*, 3 Q. B. D. 217. The second clause of this exception (which allowed suits for specific performance of agreements to refer) was repealed by Act I of 1877, sec. 2. See 5 All. 336, and Civil Pr. Code, sec. 523.

² 8 Mad. H. C. 46. These exceptions do not legalise an agreement not to object to an award on the grounds mentioned in the Code of Civil Pr., sec. 52; see 6 Mad. 370.

³ And under the Evidence Act,

sec. 93, where the language of an instrument is ambiguous or defective, no evidence can be given to make it certain or complete.

⁴ So where the defendants executed a bond containing the words 'and we hypothecate as security for the amount our property with all the rights and interests,' 1 All. 275, following 1 N. W. P. 160. If they had described themselves as the owners of certain specified property, the uncertain expression would have been referred to the description.

Agreements by way of wager, void.

30. Agreements by way of wager are void¹; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made².

Exception in favour of certain prizes for horse-racing.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race³.

Section 294 A of the Indian Penal Code not affected.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294 A of the Indian Penal Code apply⁴.

¹ But they are not illegal. See 12 Bom. H. C. 51, and *Beeston v. Beeston*, 1 Ex. D. 13.

² 9 Bom. 358. But one who repudiates the wager before the event is ascertained is not precluded by this section from recovering his deposit from the stakeholder, *Varney v. Hickman*, 5 C. B. 271. As to the common law of England as to wagers, see 6 Moo. P. C. 300, 310, per Lord

Campbell, and see 12 Bom. H. C. 51.

³ And of course it does not bar a suit for the amount of a bet paid by the plaintiff at the defendant's request, 5 All. 443.

⁴ 8 & 9 Vic. c. 109, sec. 18. The Bombay Act III of 1865, as to suits upon contracts collateral to wagering transactions, is not repealed and must be read with this section, 9 Bom. 362, 363.

CHAPTER III.

OF CONTINGENT CONTRACTS.

31. A 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen¹. Contingent contract defined.

Illustration.

A contracts to pay *B* Rs. 10,000 if *B*'s house is burnt. This is a contingent contract.

32. Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. Contracts contingent on event happening.

If the event becomes impossible, such contracts become void.

Illustrations.

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before. Contracts contingent on event not happening.

¹ The rule of the civil law that a condition the happening of which is at the will of the party making it is null and void as being destructive of the contract, is not a rule of the Indian law of contracts. 5 Mad. 173, following *Andrews v. Bolfield*, 2 C. B., N. S. 779, where a purchaser made his acceptance of a carriage, which he ordered to be built, dependent on his

approval of it as regards workmanship, convenience and taste, and it was held that the vendor was bound by the condition. But the approval must be given or withheld in good faith, and not merely for the purpose of defeating the contract, however unreasonably or capriciously, *Leake, Digest*, 637.

Illustration.

A agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

When event on which contract is contingent is future conduct of a living person.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration.

A agrees to pay *B* a sum of money if *B* marries *C*.

C marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die, and that *C* may afterwards marry *B*¹.

Contracts contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

Contracts contingent on specified event not happening within fixed time.

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations.

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Agreements contingent on

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impos-

¹ But see in England, *Randal v. Payne*, 1 Bro. C. C. 55.

sibility of the event is known or not to the parties to the impossible agreement at the time when it is made. events.

Illustrations.

(a) *A* agrees to pay *B* 1000 rupees if two straight lines should enclose a space. The agreement is void,

(b) *A* agrees to pay *B* 1000 rupees if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void¹.

¹ So if at the date of the agreement both *A* and *B* were ignorant that *C* was dead: sec. 20, *supra*.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

CONTRACTS WHICH MUST BE PERFORMED.

Obligation
of parties
to con-
tracts.

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act¹, or of any other law².

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract³.

Illustrations.

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*⁴, and *B* is bound to pay the Rs. 1000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*⁵.

Effect of
refusal to
accept offer
of per-
formance.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :—

(1) It must be unconditional⁶ :

¹ See secs. 39, 41, 48, 51-56, 62, 63, 67.

² See, for instance, the laws relating to insolvency (11 & 12 Vic. c. 21 : Civ. Pr. Code, ss. 344-360), and the local Acts relating to encumbered estates. The rule that a contract is vitiated by an alteration in a material part is not repealed by sec. 37, see 7 Cal. 616, differing from the dictum in 3 Cal. p. 223. And see the Negotiable Instruments Act, sec. 87, etc.

³ 3 Cal. 223. It is probable that the legislature did not mean to affect the general rule that the extent of the representative's liability depends on the assets which come, or might

have come, to his hands. The special case of a representative signing his name to a note, bill or cheque without expressly limiting his liability, is provided for by Act XXVI of 1881, sec. 29, *infra*.

⁴ We must suppose that *A*'s representatives could provide the goods out of his assets.

⁵ Because the personal qualities of *A* are necessary to the performance of his promise. So in cases of agency and partnership, apprenticeship, master and servant.

⁶ i.e. it must not add any new condition.

(2) It must be made at a proper time and place¹, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do :

(3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing² that the thing offered is the thing which the promisor is bound by his promise to deliver³.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them⁴.

Illustration.

A contracts to deliver to *B* at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, *A* must bring the cotton to *B*'s warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. When a party to a contract has refused⁵ to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance⁶.

Effect of refusal of party to perform promise wholly.

Illustrations.

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract,

¹ Secs. 46-50, *infra*.

² if he wishes to do so.

³ This is all that he is entitled to. A buyer (e.g.) of cotton or wine cannot continue inspecting and examining every bale and every bottle until the expiration of the period for delivery, 6 Bom. 692. As to what is a reasonable opportunity of inspection, *Startup v. Macdonald*, 6 M. & G. 593. As to tender of coin, see Act XXIII of 1870, secs. 12, 13, 14, *supra*, p. 504. As to tender of Government Promis-

sory Notes, Act XX of 1882, sec. 16, *supra*, p. 504.

⁴ So an offer to the promisee by one of several joint promisors has the same legal consequences as an offer by all of them.

⁵ not merely neglected, *Ehrensperger v. Anderson*, 3 Ex. 148.

⁶ 4 Cal. 252. The rule is explained in the notes to *Cutter v. Powell*, 2 Smith, L. C. 1. Secs. 38 and 39 seem out of place. Breach of contract is again taken up in secs. 51-55.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night, *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

BY WHOM CONTRACTS MUST BE PERFORMED.

Person
by whom
promise
is to be
performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations.

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B*, or by causing it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Effect of
accepting
performance
from third
person.

41. When a promisee accepts¹ performance of the promise from a third person, he cannot afterwards enforce it against the promisor².

Devolution
of joint
liabilities.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise³.

Any one
of joint

43. When two or more persons make a joint promise, the

¹ Sec. 4.

² In England, see *Walter v. James*, L. R. 6 Ex. 124.

³ But where a married Hindu woman contracts jointly with her

husband, she is liable only to the extent of her *stridhana*, which is analogous to a woman's separate property in England, 6 Bom. 473, following 1 Bom. 121 and 4 Bom. 318.

promisee may, in the absence of express agreement to the contrary, compel any one¹ of such joint promisors to perform the whole of the promise².

promisors may be compelled to perform.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract³.

Each promisor may compel contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Sharing of loss by default in contribution.

Explanation.—Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(a) *A, B and C jointly promise to pay D 3000 rupees. D may compel either A or B or C to pay him 3000 rupees.*

(b) *A, B and C jointly promise to pay D the sum of 3000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1250 rupees from B.*

(c) *A, B and C are under a joint promise to pay D 3000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1500 rupees from B.*

(d) *A, B and C are under a joint promise to pay D 3000*

¹ or more?

² Thus in a suit brought by the promisee on a contract made by a firm, he may select as defendants such partners as he thinks fit, and allow his right of suit against the others to be barred, 6 Bom. 700. The object of sec. 43 is, not to enable a promisee to sue one or more of his joint promisors severally in two or more suits, or, in other words, to change a joint liability into a several one at the option of the promisee. It merely allows the promisee to sue one or more of several promisors in one suit; and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him, 3 Cal. 359, 360.

Whether a group of Hindú successors is in this position seems at least doubtful. The Hindú law does not seem to impose any 'solidarity' of obligation on them except as members of an united family. See L. R. 9 I. A. 27, 31: West & B. 611, *note*.

³ As to suits for contribution, see 11 Ben. 76: 6 Ben. 633. When a joint debt is incurred the parties contemplate that it will be paid without suit. If, therefore, one of several joint debtors is sued, and compelled to satisfy the debt and the costs of the suit, he can only call on the others to contribute in respect of the debt, and not in respect of the costs, 6 N. W. P. 192.

rupees, *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

Effect of
release of
one joint
contractor.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors¹.

Devolution
of joint
rights.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them² during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly³.

Illustration.

A, in consideration of 5000 rupees lent to him by *B* and *C*, promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with *C* during *C*'s life, and, after the death of *C*, with the representatives of *B* and *C* jointly.

TIME AND PLACE FOR PERFORMANCE.

Time for
perform-

46. Where, by the contract, a promisor is to perform his

¹ This section applies to the release of liabilities arising out of the breach of a contract as well as to the release of the liability to perform a contract, 4 Cal. 336, 338.

² West & B. 608.

³ This section deals only with the case where the deceased is a joint obligee. There is nothing in the Contract Act to show what happens to a *single* right when the owner of it dies and several persons become entitled to it, 7 All. 322. In such case the Calcutta S. D. A. held that the heirs might bring separate suits for the proportion that each was entitled to. The same Court held that after the dissolution of a partnership in which the share of each partner had been ascertained, the ex-partners

could sue separately for their respective shares of the debts due to the firm, *ib.* 325. If sec. 45 applies to partners who are joint promisees, the resulting inconvenience may sometimes be very great, especially having regard to the decision in 6 Cal. 815, that if a suit is barred by limitation as to some joint promisees added as co-plaintiffs by amendment, it is barred as to the original plaintiffs also, 6 Bom. 702, per Latham J.

Notwithstanding anything contained in sec. 45, when a Government security issued before 1st April, 1886, is payable to two or more persons jointly and any of them dies, the security shall be payable to the survivor or survivors of those persons, Act XIII of 1863, sec. 3.

promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time¹.

ance of
promise
where no
time is
specified
and no
application
to be made.

Explanation.—The question 'what is a reasonable time' is, in each particular case, a question of fact.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place² at which the promise ought to be performed.

Time and
place for
performance
of
promise,
where time
is specified
and no
application
to be made.

Illustration.

A promises to deliver goods at *B*'s warehouse on the first January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee³, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Applica-
tion for
performance
to be
at proper
time and
place.

Explanation.—The question 'what is a proper time and place' is, in each particular case, a question of fact.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place⁴.

Place for
performance
of
promise,
where no
application
to be made
and no
place fixed.

¹ So if the promise is to be performed 'as soon as possible,' or 'forthwith,' or 'immediately on demand,' *Attwood v. Emery*, 1 C. B., N. S. 110; and see 36 L. J., B. 1: 4 B. & S. 442, 455.

² Secs. 49 and 94.

³ The meaning seems to be; 'and the promisee has undertaken to apply for performance.' Cf. sec. 49. When a promise is to be performed on an

uncertain day on application by the promisee seem a suit may be brought without any previous application, see Act XV of 1877. Where no day is fixed for performance and nothing is said as to application by the promisee, it seems that (except in the cases provided for by secs. 48 and 93) the promisor must perform without such application.

⁴ See as to goods sold, sec. 94.

Illustration.

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations.

(a) *B* owes *A* 2000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B*, respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2000 rupees. *B* accepts some of *A*'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*¹.

PERFORMANCE OF RECIPROCAL PROMISES.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises² to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing³ to perform his reciprocal promise.

Illustrations.

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

¹ *A* desires *B*, who owes him Rs. 100, to pay the money to *C* an agent authorised to receive it. *B* pays the money to *C*. This amounts to a payment to *A*. But see 12 Ben.

360, where the agent was to the payer's knowledge not so authorised.

² Sec. 2, cl. (f).

³ As to 'readiness and willingness' see 2 Bom. H. C. 246, 253.

A need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless *A* is ready and willing to deliver them on payment.

(*b*) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

52. Where the order in which reciprocal promises¹ are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Order of performance of reciprocal promises.

Illustrations.

(*a*) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

(*b*) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock².

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation³ from the other party for any loss which he may sustain in consequence of the non-performance of the contract⁴.

Liability of party preventing event on which contract is to take effect.

Illustration.

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance⁵.

¹ Sec. 2, cl. (f).

² And see sec. 54.

³ As to the measure of compensation, see sec. 73.

⁴ 7 N. W. P. 152 (but what was the prevention in this case?).

⁵ Compare sec. 67 *infra*, and Act XXVI of 1881, sec. 76.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract¹.

Illustrations.

(a) *A* hires *B*'s ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builders' work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

Effect of failure to perform at fixed time, in contract in which time is essential.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract².

¹ Where the failure of the promisor is due to the act of God rendering performance impossible, see sec. 56 and sec. 2, cl. (j). Where the failure is due to the act of the other

party in preventing performance, see sec. 53.

² 6 Cal. 64, where the Court held that sec. 65 applied to contracts under which the property in goods

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so¹.

Effect of acceptance of performance at time other than that agreed upon.

56. An agreement to do an act impossible in itself² is void.

Agreement to do impossible act.

A contract to do an act which, after the contract is made, becomes impossible³, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Contract to do act afterwards becoming impossible or illegal.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible³ or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Compensation for non-performance of act known to be impossible or unlawful.

Illustrations.

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) *A* and *B* contract to marry each other. Before the time sold passed, as well as to contracts where it did not pass. The Court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract, Pollock, 464, citing *Macbryde v. Weekes*, 22 Beav. 533 (contract for a lease of working mines).

¹ It constantly happens that an objection is waived by the conduct of the parties, per James L.J., 6 Ch. Ap. p. 443. The third par. of sec. 55 seems covered by secs. 62 and 63.

² not merely in relation to the person agreeing.

³ 7 Cal. 474. The words 'in itself' are omitted here and in par. 3. The impossibility must not arise from the promisor's negligence.

fixed for the marriage, *A* goes mad. The contract becomes void¹.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy, *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared².

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void³.

Reciprocal
promises to
do things
legal, and
also other
things
illegal.

57. Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement⁴.

Illustration.

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that, if *B* uses it as a gambling house, he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

Alternative
promise of
which
one branch
illegal.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A and *B* agree that *A* shall pay *B* 1000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

¹ Here *A* and *B* must be assumed to be persons with whom marriage is a contract. If they were Hindús the lunacy of *A* would be no legal impediment.

² Here, as in ill. (b), the impossibility is legal. So if a Company contract to buy some of its own shares, Act VI of 1882, sec. 249.

³ *A* would apparently be bound under sec. 65 to restore a proportionate part of the payment, which

in England he would not unless there were something in the particular contract to show that the payment was intended to be apportioned, Pollock, 689, n. Sec. 56 is out of place. It should be placed with the other sections (24-30) relating to void agreements.

⁴ The section assumes that the two sets of promises are quite distinct. When they are not, sec. 24 would apply.

APPROPRIATION OF PAYMENTS.

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

Illustrations.

(a) *A* owes *B*, among other debts, 1000 rupees upon a promissory note, which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

60. Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Where debt to be discharged is not indicated.

61. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits¹. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Where neither party makes appropriation.

CONTRACTS WHICH NEED NOT BE PERFORMED.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed².

Contracts changed, rescinded, or altered need not be performed.

¹ 6 Mad. H. C. 32.

² See the Specific Relief Act, sec. 26, cl. 6 (e), the Evidence Act, sec. 92,

and the Registration Act III of 1877, sec. 49.

Illustrations.

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C*¹, that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old².

(c) *A* owes *B* 1000 rupees under a contract. *B* owes *C* 1000 rupees. *B* orders *A* to credit *C* with 1000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1000 rupees, and no new contract has been entered into.

Promisee
may dispense with
or remit
performance of
promise.

63. Every promisee may dispense with or remit, wholly or in part³, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit⁴.

Illustrations.

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt, 2000 rupees paid at the time and place at which the 5000 rupees were payable. The whole debt is discharged⁵.

(c) *A* owes *B* 5000 rupees. *C* pays to *B* 1000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim⁶.

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A*, without ascertaining the amount, gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including

¹ The assent of the three parties is necessary to the novation.

² Accounts between *A* and *B* are stated and Rs. 1000 are found due by *B* to *A*. *B* gives *A* a bond for that amount. The bond is impounded by the revenue authorities by reason of its being insufficiently stamped. *A* cannot abandon the bond and sue *B* on the account stated, 4 All. 330.

³ with or without consideration.

⁴ See sec. 44, supra. If he remits performance of course he thereby precludes himself from enforcing it.

⁵ The Indian Act is careful to express the doctrine contrary to that of *Pinnel's case*, 5 Co. Rep. 117 (vol. 3, p. 238 of Thomas and Fraser's ed.), and *Foakes v. Beere*, 9 App. Ca. 605; v. Pollock, *Contract*, 179, note (x).

⁶ Sec. 41, supra.

B, to pay them a compensation of eight annas in the rupee upon their respective demands. Payment to *B* of 1000 rupees is a discharge of *B*'s demand.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received ¹.

Consequences of rescission of voidable contract.

65. When an agreement is discovered to be void ², or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement, or contract becoming void.

Illustrations.

(a) *A* pays *B* 1000 rupees, in consideration of *B*'s promising to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay *A* for them.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung ³.

(d) *A* contracts to sing for *B* at a concert for 1000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1000 rupees paid in advance ⁴.

¹ It does not appear what is to happen if restitution is impossible.

² If, therefore, the agreement is, from the first, known to the parties to be void, this section does not apply, 9 Bom. 358, the case of a wager.

³ This illustration, like ill. (b), properly belongs to sec. 64.

⁴ *A* a sailor contracts with *B* a

shipmaster to work for a certain sum for the whole of a certain voyage. *A* dies before the end of the voyage. *B* must pay *A*'s representatives for the work actually performed by him on the voyage before his death. Otherwise in England, see *Cutter v. Powell*, 2 Smith, L. C. 1.

Communi-
cating or
revoking
rescission
of voidable
contract.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Neglect of
promisee to
afford pro-
misor fa-
cilities for
perform-
ance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

68. If a person, incapable of entering into a contract¹, or any one whom he is legally bound to support, is supplied by another person with necessaries² suited to his condition in life the person who has furnished such supplies is entitled to be reimbursed from the property³ of such incapable person.

Claim for necessaries supplied to person incapable of contracting, or on his account.

Illustrations.

(a) *A* supplies *B*, a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children⁴ of *B*, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

69. A person who is interested in the payment⁵ of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other⁶.

Reimbursement of person paying money due by another, in payment of which he is interested.

¹ Sec. 11.

² A minor's costs of a proper suit, or defence of a suit, in which his property is involved, are 'necessaries' within the meaning of this section, 7 Cal. 144. Bramwell B. defined 'necessaries' as something reasonably required for the nourishment, clothing, lodging, education and decent behaviour and appearance according to station of the particular person, *Byder v. Wombwell*, L. R. 3 Ex. 96.

³ As to his personal liability, see sec. 70.

⁴ i.e. legitimate children. The illustration assumes that a husband

and parent is under legal obligation to support his wife and children.

⁵ 4 Bom. 652.

⁶ 4 Cal. 369 : 7 Cal. 648 : 12 Cal. 213. As to contribution between joint promisors and co-sureties, see secs. 43, 46 and 140. A suit for contribution, in which both plaintiff and defendant were liable for the money paid by the plaintiff, does not seem to fall within the scope of this or the next following section, 8 Cal. 113, and see 6 Bom. 244. For the circumstances under which contribution can and cannot be recovered, see 8 Bom. H. C., A. C. J. 31, and 3 Bom. 237.

Illustration.

B holds lands in Bengal, on a lease granted by *A*, the zamíndár. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B*, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid ¹.

Obligation
of person
enjoying
benefit of
non-gratui-
tous act.

70. Where a person lawfully² does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered ³.

Illustrations.

(a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

Responsi-
bility of
finder of
goods.

71. A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee ⁴.

Liability
of person
to whom
money is
paid by
mistake
or under
coercion.

72. A person to whom money has been paid, or any thing delivered, by mistake ⁵, or under coercion ⁶, must repay or return it ⁷.

¹ But where *A* takes wrongful possession of *B*'s land, collects the rents and pays the Government revenue, and *B* recovers possession and the rents, *A* has no remedy against *B* for the amount so paid, 7 All. 660. *A* must be content to bear the burden of his own wrong. So if *A* pays *B*'s debts, supposing that he has authority to do so, but in fact having no such authority. Or if *A* innocently obtains possession of *B*'s horse and wrongfully holds possession of it, *A* cannot claim from *B* the price of food or medicine which *A* may have supplied to the horse, 4 Cal. 568, 569.

² 4 Bom. 653.

³ 3 All. 66, 72; 5 All. 405; 12 Cal. 213. Where the purchaser of a revenue-paying estate was compelled to pay arrears of revenue due at the

date of the sale, it was held that neither sec. 69 nor sec. 70 entitled him to recover the money so paid from the vendor, 6 All. 67. The Transfer of Property Act (IV of 1882), sec. 55 (1), cl. g was not then in force.

⁴ Secs. 151, 152, *infra*. As to treasure-trove, see Act VI of 1878.

⁵ As to his legal liability to repay or return the money or thing, *Marriot v. Hampton*, 2 Smith, L. C. 356 and notes.

⁶ Sec. 15.

⁷ 1 All. 79. This gets rid of the English fiction of an implied contract and promise to pay, 2 All. 674. Compare the Trusts Act, sec. 86.

Where the payment is made pursuant to a contract caused by one of the parties being under a mistake of fact, see sec. 22.

Illustrations.

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

Compensation for loss or damage caused by breach of contract.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it ¹.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach ².

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract ³ has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience ⁴ caused by the non-performance of the contract must be taken into account.

Illustrations.

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre

¹ A suit is none the less a suit for compensation because it is brought for the specific sum due on a bond, 6 Bom. 76.

As to compensation awardable for breach of contract for the supply of indigo plant, see Ben. Reg. VI of

1823, and 1 Agra 69 : 4 Agra 77.

² As to compensation in case of dishonour of negotiable instruments, see Act XXVI of 1881, sec. 117.

³ See Chap. V, supra.

⁴ i.e. 'obviating or lessening the loss or damage,' Cunn. & Shepp. 242.

of like quality at the time when the saltpetre ought to have been delivered.

(b) *A* hires *B*'s ship to go to Bombay, and there take 'on board, on the first of January, a cargo, which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense¹.

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

¹ So if an agent or servant is wrongfully discharged he is bound if possible to obtain fresh employment, and the wages which have been, or might have been, gained by such em-

ployment are deducted from the compensation to which he is entitled, *Hochster v. De la Tour*, 22 L. J., Q. B. 458.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) *A*, having contracted with *B* to supply *B* with 1000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*¹. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be re-built by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to

¹ Some words such as 'and also informing *C* of the nature of that contract' seem wanted here.

C with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

(*n*) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day. *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(*o*) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B*, afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

(*p*) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

(*q*) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(*r*) *A*, a ship-owner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and *B*, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late¹.

¹ Other cases on measure of damages, are in 2 Ben. Appx. 27 : 3 Ben. A. C. J. 88, 413 : 6 Ben. Appx. 20 : 8 Ben. 459, 544 : in Madras, 1 Mad. H. C. 162, 168 : 4 ibid. 410 :

5 ibid. 70 : 6 ibid. 85 : 7 ibid. 235 : in Bombay, 5 Bom. H. C., O. C. J. 140 : 8 ibid. 130 : in the N.W. Provinces, 2 All. 756 : 5 All. 238. And as to damages when a note, bill or cheque

Compensation for breach of contract in which sum is named as payable in case of breach.

74. When a contract has been broken¹, if a sum is named in the contract as the amount to be paid in case of such breach², the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named³.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein⁴.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

(a) *A* contracts with *B* to pay *B* Rs. 1000, if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1000, as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practises as a surgeon within Calcutta, he will pay *B* Rs. 5000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5000, as the Court considers reasonable.

is dishonoured, see the Negotiable Instruments Act, *infra*, s. 117, and Code of Civil Procedure, s. 532.

¹ Breach of contract is the sole and essential precedent condition to a title to damages by way of penalty, 6 All. 184.

² *Quære* does this apply to cases in which only interest at a certain rate is payable? 6 Mad. 169; 2 Cal. 206. It depends on whether the higher rate of interest is a penalty. 6 All. 179; 9 Cal. 615, 689. The section does not apply to a contract to pay an amount on demand with interest at the rate of one anna per rupee per month (Rs. 6-4-0 per cent.); to pay that interest every six months, and, if he failed to pay the interest for any six months, to pay

interest on such interest at such rate, 6 All. 63, and see *ibid.* 64.

³ 1 Mad. 349. This section does away with the distinction between a penalty and liquidated damages, 3 Mad. 228; Pollock, *Contract*, 467, note (5). If a sum be named in the contract as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages, 9 Cal. 692, and see 8 Cal. 286; 6 N. W. P. 365.

The expression 'reasonable compensation' implies that the discretion vested in the Court must be exercised with care, caution, and on sound principles, 5 All. 242.

⁴ See also Act I of 1878, sec. 25; Bom. Act 5 of 1879, sec. 27.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract¹.

Party
rightfully
rescinding
contract,
entitled to
compensa-
tion.

Illustration.

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract¹.

¹ See secs. 19, 39, 53, and 54.

CHAPTER VII.

SALE OF GOODS.

WHEN PROPERTY IN GOODS SOLD PASSES.

'Goods'
defined.

76. In this chapter, the word 'goods' means and includes every kind of movable property¹.

'Sale'
defined.

77. 'Sale' is the exchange of property for a price². It involves the transfer of the ownership of the thing sold from the seller to the buyer³.

Sale how
effected.

78. Sale is effected by offer and acceptance of ascertained goods for a price,

or of a price for ascertained goods,

together with payment of the price or delivery of the goods; or with tender, part-payment, earnest⁴ or part-delivery⁵; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

¹ But not, apparently, documents showing title to goods, see sec. 108, or in sec. 108, money or negotiable instruments transferable by delivery, or things *extra commercium*, 7 Mad. H. C. 210. The term may probably be regarded as equivalent to the expression 'goods, wares, and merchandise' so frequently discussed in English courts with reference to the Statute of Frauds, Cunn. & Shepp. 249.

² The exchange of a Government currency note for rupees is not a 'sale,' as this is only the barter of money in one form for money in another. Either form being legal tender, it is impossible to say that one is the 'price' of the other, 3 Cal. 382. See as to such exchanges the

Transfer of Property Act, *infra*, s. 121.

³ 15 Ben. 289.

⁴ 'Earnest' (*arra*) is anything 'given by the buyer to the vendor and accepted by the latter to mark the final conclusive assent of both sides to the bargain' (Benjamin, Pers. Prop. 137.) Though obsolete in England, the practice of giving earnest on sales of goods prevails among Hindús. See 1 Mad. H. C. 9, where it was held that by Hindú law the purchaser might recover, in an action for breach of contract to deliver goods, double the earnest money *plus* damages for non-delivery.

⁵ As to part delivery, see more in sec. 92 *infra*.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

Illustrations.

(a) *B* offers to buy *A*'s horse for 500 rupees. *A* accepts *B*'s offer, and delivers the horse to *B*. The horse becomes *B*'s property on delivery.

(b) *A* sends goods to *B*, with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. *B* retains the goods, and informs *A* that he approves of them. The goods become *B*'s when *B* retains them.

(c) *B* offers *A*, for his horse, 1000 rupees, the horse to be delivered to *B* on a stated day, and the price to be paid on another stated day. *A* accepts the offer. The horse becomes *B*'s as soon as the proposal is accepted.

(d) *B* offers *A*, for his horse, 1000 rupees, on a month's credit. *A* accepts the offer. The horse becomes *B*'s as soon as the offer is accepted.

(e) *B*, on the first January, offers to *A*, for a quantity of rice¹, 2000 rupees, to be paid on the first March following, the rice not to be taken away till paid for. *A* accepts the offer. The rice becomes *B*'s as soon as the offer is accepted.

79. Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished², the ownership of the thing is not transferred to the buyer until it is ascertained, made or finished.

Illustration.

B orders *A*, a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, *B* pays to *A* money from time to time on account of the price. The ownership of the barge does not pass to *B* until it is finished.

80. Where, by a contract for the sale of goods, the seller

Transfer of ownership of thing sold, which has yet to be ascertained, made or finished.
Completion of sale

¹ i. e. an ascertained quantity of the buyer is to take it, see sec. 80 infra.

² i. e. put into the state in which

of goods which the seller is to put into state in which buyer is to take them.

is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done¹.

Illustration.

A, a ship-builder, contracts to sell to *B*, for a stated price, a vessel which is lying in *A*'s yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to *B* until the vessel has been rigged, fitted up, and delivered.

Completion of sale of goods, when seller has to do anything thereto in order to ascertain price.

81. Where anything remains to be done to the goods by the seller², for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

(a) *A*, the owner of a stack of bark, contracts to sell it to *B*, weigh and deliver it, at 100 rupees per ton. *B* agrees to take and pay for it on a certain day. Part is weighed and delivered to *B*; the ownership of the residue is not transferred to *B* until it has been weighed pursuant to the contract.

(b) *A* contracts to sell a heap of clay to *B* at a certain price per ton. *B* is, by the contract, to load the clay in his own carts, and to weigh each load at a certain weighing machine, which his carts must pass on their way from *A*'s ground to *B*'s place of deposit. Here, nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.

When goods are unascertained at date of contract.

82. Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained¹.

Illustration.

A agrees to sell to *B*, 20 tons of oil in *A*'s cisterns. *A*'s cisterns contain more than 20 tons of oil. No portion of the oil has become the property of *B*.

Ascertainment of goods by subsequent appropriation.

83. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party, for the purpose of the agreement, and that appro-

¹ This section seems covered by sec. 79.

² Why 'by the seller'?

priation is assented to by the other, the goods have been ascertained, and the sale is complete.

Illustration.

A, having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell *B* 20 hogsheads of it. After the contract, *A* fills 20 hogsheads with the sugar, and gives notice to *B* that the hogsheads are ready, and requires him to take them away. *B* says he will take them as soon as he can. By this appropriation by *A*, and assent by *B*, the sugar becomes the property of *B*.

84. Where the goods are not ascertained at the time of making the contract of sale, and, by the terms of the contract, the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so, the goods are ascertained.

Ascertainment of goods by seller's selection.

Illustration.

B agrees with *A* to purchase of him, at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in *A*'s granary. It is agreed that *B* shall send sacks for the rice, and that *A* shall put the rice into them. *B* does so, and *A* puts 50 maunds of rice into the sacks. The goods have been ascertained.

85. Where an agreement is made for the sale of immovable and movable property combined, the ownership of the movable property does not pass before the transfer of the immovable property¹.

Transfer of ownership of movable property. when sold together with immovable.

Illustration.

A agrees with *B* for the sale of a house and furniture. The ownership of the furniture does not pass to *B* until the house is conveyed to *B*.

86. When goods have become the property of the buyer, he must bear any loss² arising from their destruction or injury.

Buyer to bear loss after goods have become his property.

Illustrations.

(a) *B* offers, and *A* accepts, 100 rupees for a stack of fire-wood

¹ 5 Bom. 554.

² not caused by the seller. See secs. 151, 161.

to be paid for at the time of delivery. *A* gives to *C*, a wharfinger, at whose wharf he had twenty tons of the oil, an order to transfer five of them into the name of *B*. *C* makes the transfer in his books, and gives *A*'s clerk a notice of the transfer for *B*. *A*'s clerk takes the transfer notice to *B*, and offers to give it him on payment of the price of the oil. *B* refuses to pay. There has been no delivery to *B*, as *B* never assented to make *C* his agent to hold for him the five tons selected by *A*.

Effect of
delivery to
wharfinger
or carrier.

91. A delivery to a wharfinger or carrier of the goods sold, has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

Illustration.

B, at Agra, orders of *A*, who lives at Calcutta, three casks of oil to be sent to him by railway. *A* takes three casks of oil directed to *B* to the railway station, and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach *B*. There has not been a sufficient delivery to charge *B* in a suit for the price.

Effect
of part-
delivery.

92. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Illustrations.

(a) A ship arrives in a harbour laden with a cargo consigned to *A*, the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to *A* in progress of the delivery of the whole. This is a delivery of the cargo to *A* for the purpose of passing the property in the cargo.

(b) *A* sells to *B* a stack of fire-wood, to be paid for by *B* on delivery. After the sale, *B* applies for and obtains from *A* leave to take away some of the fire-wood. This has not the legal effect of delivery of the whole¹.

(c) *A* sells 50 maunds of rice to *B*. The rice remains in *A*'s

¹ Here the asking and obtaining leave showed an intention of severing from the whole stack the firewood

comprised in the application, 4 B. & Ad. 568.

warehouse. After the sale, *B* sells to *C* 10 maunds of the rice, and *A*, at *B*'s desire, sends the 10 maunds to *C*. This has not the legal effect of a delivery of the whole.

93. In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery. Seller not bound to deliver until buyer applies.

94. In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced ¹. Place of delivery.

SELLER'S LIEN.

95. Unless a contrary intention appears ² by the contract, a seller has a lien on sold goods ³ as long as they remain in his possession ⁴ and the price or any part of it remains unpaid ⁵. Seller's lien.

96. Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price. Lien where payment to be made at future day, but no time fixed for delivery.

Explanation.—A person is insolvent who has ceased to pay 'Insolvency' defined, his debts in the usual course of business, or who is incapable of paying them ⁶.

¹ There is a distinction between a contract of sale and a contract to pay an existing debt in specific articles. In the latter case, where no place of delivery is specially appointed or is to be inferred from the usage of trade or the nature of the thing, it is the duty of the debtor, first, to request the creditor to appoint a place, whereupon the creditor must appoint a place which is reasonable; if he do not, the debtor himself may name a reasonable place, giving notice to his creditor; and a tender of the pro-

perty at that place will be good. So also when the time of delivery is fixed, although the place is not, the same rule applies. 5 Bom. H. C., A. C. J. 128, per Couch C.J., citing Story on Contracts, 881.

² either expressly or impliedly.

³ for the price, not also the expenses of keeping or taking care of the goods.

⁴ Sec. 90.

⁵ or untendered, *Martindale v. Smith*, 1 Q. B. 389.

⁶ Failure to pay one just and ad-

Illustration.

A sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s warehouse. Before the expiry of the three months, *B* becomes insolvent. *A* may retain the goods for the price.

Seller's
lien where
payment to
be made
at future
day, and
buyer
allows
goods to
remain
in seller's
possession.

97. Where, by the contract, the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

Illustration.

A sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s warehouse till the expiry of the three months, and then does not pay for them. *A* may retain the goods for the price.

Seller's lien
against
subsequent
buyer.

98. A seller, in possession of goods sold, may retain them for the price against any subsequent buyer, unless the seller has recognised the title of the subsequent buyer.

STOPPAGE IN TRANSIT.

Right of
seller to
stop in
transit.

99. A seller¹ who has parted with the possession of the goods, and has not² received the whole price, may, if the buyer becomes insolvent³, stop the goods while they are in transit to the buyer.

When
goods are
to be
deemed
in transit.

100. Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

mitted debt is in England, and apparently in India, sufficient evidence of insolvency to justify the exercise of the rights of lien and stoppage *in transitu* (sec. 99); see Benjamin, 633.
¹ or a person in the position of a seller, e.g., one who has on his own

credit bought goods for another, 2 Agra Civ. Court App. 11.

² himself or by an agent.

³ before the goods reach him: he need not be insolvent at the time of the stoppage. As to the meaning of 'insolvent,' see sec. 96, expl.

Illustrations.

(a) *B*, living at Madras, orders goods of *A*, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to *C*, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of *C*, are in transit.

(b) *B*, at Delhi, orders goods of *A*, at Calcutta. *A* consigns and forwards the goods to *B* at Delhi. On arrival there, they are taken to the warehouse of *B*, and left there. *B* refuses to receive them and immediately afterwards stops payment. The goods are in transit.

(c) *B*, who lives at Púná, orders goods of *A* at Bombay. *A* sends them to Púná by *C*, a carrier appointed by *B*. The goods arrive at Púná, and are placed by *C*, at *B*'s request, in *C*'s warehouse for *B*. The goods are no longer in transit.

(d) *B*, a merchant of London, orders 100 bales of cotton of *A*, a merchant at Bombay. *B* sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e) *B*, a merchant of London, orders 100 bales of cotton of *A*, a merchant at Bombay. *B* sends his own ship to Bombay for the cotton. *A* delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to *A*'s order or assigns. The cotton arrives at London, but before coming into *B*'s possession, *B* becomes insolvent. The cotton has not been paid for. *A* may stop the cotton.

101. The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's reselling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

Continu-
ance of
right of
stoppage.

102. The right of stoppage ceases if the buyer, having obtained a bill of lading or other document¹ showing title to the goods², assigns it, while the goods are in transit, to a second buyer, who is acting in good faith, and who gives valuable consideration for them.

Cessation
of right
on assign-
ment, by
buyer, of
document
showing
title.

Illustrations.

(a) *A* sells and consigns certain goods to *B*, and sends him the bill of lading. *A* being still unpaid, *B* becomes insolvent, and while the goods are in transit, assigns the bill of lading for cash to *C*, who is not aware of his insolvency. *A* cannot stop the goods in transit.

¹ Sec. 108,

² See sec. 108, exc. 1.

(b) *A* sells and consigns certain goods to *B*. *A* being still unpaid, *B* becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to *C*, who knows that *B* is insolvent. The assignment not being in good faith, *A* may still stop the goods in transit.

How seller
may stop
where
instrument
of title
assigned
to secure
specific
advance.

103. Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

Illustrations.

(a) *A* sells and consigns goods to *B* of the value of 12,000 rupees. *B* assigns the bill of lading for these goods to *C*, to secure a specific advance of 5000 rupees made to him upon the bill of lading by *C*. *B* becomes insolvent, being indebted to *C* to the amount of 9000 rupees. *A* is not entitled to stop the goods except on payment or tender to *C* of 5000 rupees.

(b) *A* sells and consigns goods to *B* of the value of 12,000 rupees. *B* assigns the bill of lading for these goods to *C*, to secure the sum of 5000 rupees due from him to *C*, upon a general balance of account. *B* becomes insolvent. *A* is entitled to stop the goods in transit without payment or tender to *C* of the 5000 rupees.

Stoppage
how
effected.

104. The seller may effect stoppage in transit, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depositary in whose possession they are ¹.

Notice of
seller's
claim.

105. Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

Right of
seller on
stoppage.

106. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

¹ See as to the effect of the notice, sec. 209, *infra*.

Illustration.

A sells to *B* 100 bales of cotton; 60 bales having come into *B*'s possession, and 40 being still in transit, *B* becomes insolvent, and *A* being still unpaid, stops the 40 bales in transit. *A* is entitled to hold the 40 bales until the price of the 100 bales is paid.

RESALE.

107. Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, resell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such resale¹.

Resale on
buyer's
failure to
perform.

TITLE.

108. No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases :—

Title
conveyed
by seller
of goods
to buyer.

*Exception 1*².—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership³ of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good

¹ This section does not exclude the remedy under sec. 55; 6 Cal. 64: 4 Cal. 805. If the property has not passed sec. 107 does not apply, 15 Ben. 285, per Pontifex J.

² This exception does not apply to cases where the possession is entirely beyond the control of the owner of the goods, 8 Bom. 509, following 12 Ben. 42. The 'possession' meant is an unqualified possession, not to be restricted otherwise than by the owner giving instructions to the person who has it. It is the kind of possession which a factor or agent has, where the owner of the goods, though he has parted with the possession, may give

instructions to the person in possession, what to do with the goods. He may give instructions to sell for not less than a particular price, or not before a particular time. It is such possession as an owner has. The exception does not apply where there is only a qualified possession such as the hirer of goods has, or where the possession is for a specific purpose. In such a case the owner has no right to give instructions, 12 Ben. 46, 47, per Couch C.J.

³ The proviso shows that the words 'transfer the ownership of' simply mean 'sell.'

title thereto, notwithstanding any instructions of the owner to the contrary: Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.—If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them ¹.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto ², the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents ³.

In this case ⁴ the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract ⁵.

Illustrations.

(a) *A* buys from *B*, in good faith, a cow which *B* had stolen from *C*. The property in the cow is not transferred to *A*.

(b) *A*, a merchant, entrusts *B*, his agent, with a bill of lading relating to certain goods, and instructs *B* not to sell the goods for less than a certain price, and not to give credit to *D*. *B* sells the goods to *D* for less than that price, and gives *D* three months' credit. The property in the goods passes to *D*.

¹ As to the presumption in the case of a member of a Hindú undivided family, see 11 Ben. 193.

² Sec. 19.

³ This limitation appears to be new, Pollock, 703, who remarks that no general principle is laid down as to rights of third persons intervening.

⁴ Where the seller has lost his

right of rescinding the contract against the original buyer.

⁵ As to market overt, the policy of the rule seems an open question. The Indian Contract Act contains no such provision; while, on the other hand, the German Commercial Code (sec. 306) extends it to all sales made by a trader in the course of his business, Pollock 397, note (c).

(c) *A* sells to *B* goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to *C*, and it has not been endorsed by *C*. The property is not transferred to *B*.

(d) *A*, *B* and *C* are joint Hindú brothers, who own certain cattle in common. *A* is left by *B* and *C* in possession of a cow, which he sells to *D*. *D* purchases *bona fide*. The property in the cow is transferred to *D*.

(e) *A*, by a misrepresentation not amounting to cheating, induces *B* to sell and deliver to him a horse. *A* sells the horse to *C* before *B* has rescinded the contract. The property in the horse is transferred to *C*; and *B* is entitled to compensation from *A* for any loss which *B* has sustained by being prevented from rescinding the contract.

(f) *A* compels *B* by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and, before *B* rescinds the contract, sells the horse to *C*. The property is not transferred to *C*.

WARRANTY.

109. If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract ¹.

Seller's responsibility for badness of title.

110. An implied warranty of goodness or quality may be established by the custom of any particular trade.

Warranty of goodness or quality.

111. On the sale of provisions, there is an implied warranty that they are sound.

Warranty on sale of provisions.

112. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.

Warranty on sale of goods by sample.

113. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Warranty where goods are sold as of certain denomination.

Explanation.—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

¹ This seems to exclude, so far at least as concerns title, the application to a sale of goods of the English maxim *caveat emptor*, 2 Bom. 163.

Illustrations.

(a) *A*, at Calcutta, sells to *B* twelve bags of 'waste silk,' then on its way from Murshedabad to Calcutta. There is an implied warranty by *A* that the silk shall be such as is known in the market under the denomination of 'waste silk.'

(b) *A* buys, by sample and after having inspected the bulk, 100 bales of 'Fair Bengal' cotton. The cotton proves not to be such as is known in the market as 'Fair Bengal'; there is a breach of warranty.

Warranty
where
goods
ordered for
a specified
purpose.

114. Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Illustration.

B orders of *A*, a copper manufacturer, copper for sheathing a vessel. *A*, on this order, supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.

Warranty
on sale of
article of
well-known
ascertained
kind.

115. Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Illustration.

B writes to *A*, the owner of a patent invention for cleaning cotton—'Send me your patent cotton-cleaning machine to clean the cotton at my factory.' *A* sends the machine according to order. There is an implied warranty by *A* that it is the article known as *A*'s patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at *B*'s factory.

Seller
when not
responsible
for latent
defects.

116. In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect¹ in it.

Illustration.

A sells to *B* a horse. It turns out that the horse had, at the time of the sale, a defect of which *A* was unaware. *A* is not responsible for this.

117. Where a specific article, sold with a warranty, has

¹ i. e. a defect which a competent person using proper care could not discover, *Randall v. Newsom*, 45 L. J., Q. B. 366, per Blackburn J.

been delivered and accepted, and the warranty is broken, the Buyer's sale is not thereby rendered voidable; but the buyer is entitled ^{right on breach of} to compensation from the seller for loss caused by the breach ^{warranty.} of warranty.

Illustration.

A sells and delivers to *B* a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but *B* is entitled to compensation from *A* for loss caused by the unsoundness.

118. Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may

accept the goods or refuse to accept the goods when tendered,

Right of
buyer on
breach of
warranty
in respect
of goods
not as-
certained.

or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial¹.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

Illustrations.

(a) *A* agrees to sell and, without application on *B*'s part, deliver to *B* 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to *B*. *B* may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(b) *B* agrees to buy of *A* twenty-five sacks of flour by sample. The flour is delivered to *B*, who pays the price. *B*, upon examination, finds it not equal to sample; *B* afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from *A* for any loss caused by the breach of warranty.

(c) *B* makes two pairs of shoes for *A* by *A*'s order. When the shoes are delivered, they do not fit *A*. *A* keeps both pairs for a

¹ And he may also apparently use damages in any suit brought against the breach of warranty to reduce him for the price of the things sold.

day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

MISCELLANEOUS.

Refusal to accept, if goods not ordered are sent with goods ordered.

119. When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

Illustration.

A orders of *B* specific articles of china. *B* sends these articles to *A* in a hamper, with other articles of china which had not been ordered. *A* may refuse to accept any of the goods sent.

Wrongful refusal to accept.

120. If a buyer wrongfully refuses to accept¹ the goods sold to him, this amounts to a breach of the contract of sale.

Right of rescission, on buyer's failure to pay at time fixed.

121. When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed, unless it was stipulated by the contract that he should be so entitled.

Sale and transfer of lots sold by auction.

122. Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Use, by seller, of pretended biddings.

123. If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer².

¹ Refusal to accept may be rightful under secs. 94, 118, etc.

² This adopts the rule of the common law. See now in England 30 &

31 Vic. c. 48, which abolished the supposed rule of Courts of equity that the employment of one puffer was allowable.

CHAPTER VIII.

OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person¹, is called a 'contract of indemnity' defined.

Illustration.

A contracts to indemnify *B* against the consequences of any proceedings which *C* may take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemnity².

125. The promisee in a contract of indemnity, acting within the scope of his authority³, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs⁴ which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of

¹ not the promisee.

² *A* sells shares to *B*. There is an implied contract by *B* to indemnify *A* against future calls on the shares, *Roberts v. Crowe*, L. R. 7 C. P. 629, 636, where Willes J. said that 'where two persons are equally liable for a debt, and the person who is not in enjoyment of the property in respect of which the debt arises, and there-

fore only secondarily liable, is called upon to pay, he shall have an indemnity from the other.' Sec. 124 does not include contracts of insurance.

³ This, of course, assumes that the authority is to perform lawful acts. As to illegal acts the maxim is 'there is no contribution between wrong-doers.'

⁴ as between attorney and client.

any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

'Contract of guarantee,'
'surety,'
'principal debtor,'
and
'creditor.'

126. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor,' and the person to whom the guarantee is given is called the 'creditor.' A guarantee may be either oral or written.

Consideration for guarantee.

127. Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations.

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that, if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void¹.

Surety's liability.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract².

Illustration.

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable, not only for

¹ See 1 All. 487, 496. The illustration assumes that there was no privity between *C* and *B*, and that *C* acted merely as a volunteer.

² This is merely an enactment of

the common law, 5 Bom. 650. That the creditor need not exhaust his remedy against the principal debtor before suing the surety, see 6 Bom. H. C., A. C. J. 241.

the amount of the bill, but also for any interest and charges which may have become due on it.

129. A guarantee which extends to a series of transactions, is called a 'continuing guarantee.'

Illustrations.

(a) *A*, in consideration that *B* will employ *C* in collecting the rents of *B*'s zamindari, promises *B* to be responsible, to the amount of 5000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to above the value of £100, and *C* pays *B* for it. Afterwards, *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks¹.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice² to the creditor.

Illustrations.

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5000 rupees. *B* discounts bills for *C* to the extent of 2000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

¹ And see 9 Ben. 364.

As to the evidence whether a guarantee is or is not 'continuing' see *Coles v. Pack*, L. R. 5 C. P. 65, 70; *Wood v. Priestner*, L. R. 2 Ex. 66:

Nottingham Hide &c. Co. v. Bottrill, L. R. 8 C. P. 694.

² Notice by word of mouth would be sufficient, whether the guarantee be oral or in writing or under seal.

Revoca-
tion by
surety's
death.

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions ¹.

Liability
of two
persons,
primarily
liable, not
affected by
arrange-
ment as to
suretyship.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence ².

Illustration.

A and *B* make a joint and several promissory note to *C*. *A* makes it, in fact, as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

Discharge
of surety
by variance
in terms
of contract.

133. Any variance ³, made without the surety's consent, in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations.

(a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself.

¹ There seems no exception in the case of a continuing guarantee, as to which see *Bradbury v. Morgan*, 31 L. J., Ex. 462; and the revocation takes effect, as regards the creditor, before he knows of the death. Otherwise in the case of an agent, sec. 208.

² 3 Cal. 184, where it was held that a party who accepts bills of exchange for the accommodation of

another is not precluded by sec. 132 from pleading that he was an accommodation acceptor only.

³ whether or not in a material point? This can hardly have been intended. In England the surety is not discharged unless the contract and his corresponding liability are substantially varied, *Gardner v. Walsh*, 24 L. J., Q. B. 285.

A is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5000 rupees on the first March. *A* guarantees repayment. *C* pays the 5000 rupees to *B* on the first January. *A* is discharged from his liability, as the contract has been varied, inasmuch as *C* might sue *B* for the money before the first of March¹.

134. The surety is discharged by any contract² between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission³ of the creditor, the legal consequence of which is the discharge of the principal debtor⁴.

Discharge of surety or release by discharge of principal debtor.

Illustrations.

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for the irrigation of *A*'s land, and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

¹ So when *A* guaranteed payment of the rent payable by *B* for certain zamindari estates under a kabuliyat, and *B*, by a subsequent kabuliyat agreed, without *A*'s consent, to pay a higher rent for the same estates, *A* was held to be discharged, 3 All. 9. See 5 Bom. 647, followed in 12 Cal. 330.

² There must be a contract: mere forbearance to sue is not enough.

³ See secs. 39, 53, 54, 55, 62, 63, 67, 118, and 120.

⁴ This section must be read with sec. 137 (7 Bom. 149), which qualifies it (5 Bom. 650). See also Act XXVI of 1881, sec. 39.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

Discharge of surety when creditor compounds with, etc. principal.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract¹.

Surety not discharged by agreement with third person to give time to principal.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *A* is not discharged.

Creditor's forbearance to sue does not discharge surety.

137. Mere forbearance² on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration.

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

Release of one co-surety.

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties³.

Discharge of surety by creditor's act or

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty

¹ See Act XXVI of 1881, sec. 39. The surety's assent amounts to a new contract between him and the creditor.

² i. e. a forbearance not resting upon, or in consequence of, such a

promise to give time to, or not to sue the principal debtor, as is the subject of sec. 135; 5 Bom. 651, followed in 12 Cal. 330.

³ See sec. 44, which covers sec. 138.

to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged ¹.

omission
impairing
surety's
remedy.

Illustrations.

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this prepayment ².

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realised. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor ³.

Rights of
surety on
payment
or per-
formance.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts

Surety's
right to
benefit of
creditor's
securities.

¹ 3 Cal. 187; 4 Cal. 331. It is no part of the creditor's duty to sue the principal debtor at any particular time, 5 Bom. 651. The section should provide that the dealings of the guaranteed creditor with his debtor should be conducted in the manner in which a person of ordinary prudence would conduct them, if he were not guaranteed (cf. sec. 125, cl. 2). Cunn. and Shep. 330. But see sec. 145.

² See sec. 133.

³ But see sec. 145 as to the amount which the surety can recover from the principal. Although the creditor's right to sue the principal debtor is barred by limitation, such will not be the case with the surety's right to sue the principal debtor, if the surety be compelled to pay the debt or any part thereof to the creditor; for the period of limitation to the surety's suit against the principal debtor would not begin to run until such payment, 5 Bom. 651.

with such security, the surety is discharged to the extent of the value of the security.

Illustrations.

(a) *C* advances to *B*, his tenant, 2000 rupees on the guarantee of *A*. *C* has also a further security for the 2000 rupees by a mortgage of *B*'s furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture.

(b) *C*, a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged ¹.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

Guarantee
obtained
by misre-
presenta-
tion.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid ².

Guarantee
obtained
by con-
cealment.

143. Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance, is invalid ³.

Illustrations.

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A* in consequence calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *A* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

¹ This seems to illustrate sec. 139 rather than sec. 141.

² *Illustr.* *A* advances Rs. 1000 to *B* upon the security of a mortgage by *B* and of a bond for Rs. 1000 in which *C* joins *B* as surety. At the time of the advance *B* owed *A* Rs. 300 which were deducted from the Rs. 1000;

but the mortgage deed, which was read by *A*'s agent in *C*'s presence, untruly stated that the Rs. 300 had been paid. *C*'s guarantee is invalid (*Stone v. Compton*, 5 Bing. N. C. 142 : compare sec. 19).

³ 6 Mad. 409. Sec. 143 goes further than the English law.

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join ¹.

Guarantee on contract that creditor shall not act until co-surety joins.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Implied promise to indemnify surety.

Illustrations.

(a) *B* is indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2000 rupees, but obtains from *A* payment of the sum of 2000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary ², are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor ³.

Co-sureties liable to contribute equally.

¹ Covered by sec. 33, and cf. sec. 133.

² As, e.g., when one surety contracts that he will be liable only on default

of previous sureties, *Craythorne v. Swinburne*, 14 Ves. 160, 170.

³ Covered by sec. 43.

Illustrations.

(a) *A, B and C* are sureties to *D* for the sum of 3000 rupees lent to *E*. *E* makes default in payment. *A, B and C* are liable, as between themselves, to pay 1000 rupees each.

(b) *A, B and C* are sureties to *D* for the sum of 1000 rupees lent to *E*, and there is a contract between *A, B and C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *C* 250 rupees, and *B* 500 rupees.

Liability of
co-sureties
bound in
different
sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations.

(a) *A, B and C*, as sureties for *D*, enter into three several bonds each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A, B and C* are each liable to pay 10,000 rupees.

(b) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

(c) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A, B and C* have to pay each the full penalty of his bond.

CHAPTER IX.

OF BAILMENT ¹.

148. A 'bailment' is the delivery of goods by one person 'Bailment,' to another for some purpose, upon a contract that they shall, 'bailor,' when the purpose is accomplished, be returned or otherwise and 'bailee' disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor.' The person to whom they are delivered is called the 'bailee.'

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf ². Delivery to bailee how made.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults. Bailor's duty to disclose faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

¹ As to bailments to carriers, see XVIII of 1854, III of 1865, XIII of 1870, and XXV of 1871.

² See sec. 90.

Illustrations.

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

Care to be taken by bailee.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence¹ would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed².

Bailee when not liable for loss, etc., of thing bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151³.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration.

A lets to *B*, for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

Bailee making unauthorised use of goods bailed.

154. If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations.

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a

¹ Compare Act IV of 1882, sec. 76, cl. (a).

² 6 Cal. 227, where a foreign steamship-company, contracting in Calcutta, were held bound by this section.

³ It seems doubtful whether secs. 151, 152, apply to common carriers. The Bombay High Court holds that they do, 3 Bom. 109; the Calcutta

High Court that they do not; 10 Cal. 166, but see p. 213. Express provisions as to the liability of common carriers are made by Act III of 1865, secs. 3-9. As to bailments for carriage to Indian Railway Companies, see Act IV of 1879, chap. iii.

member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Mixture, with bailor's consent, of his goods with bailee's.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Mixture, without his consent, when goods can be separated.

Illustration.

A bails 100 bales of cotton marked with a particular mark to *B*. *B*, without *A*'s consent, mixes the 100 bales with other bales of his own, bearing a different mark: *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods¹.

Mixture, without his consent, when goods cannot be separated.

Illustration.

A bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to re-

Repayment by bailor of necessary expenses.

¹ Or the bailor may take an interest in the mixture, in proportion to his share, sec. 155.

ceive no remuneration, the bailor shall repay to the bailee the necessary¹ expenses incurred by him for the purpose of the bailment.

Restoration of goods bailed gratuitously.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived².

Return of goods bailed, on expiration of time or accomplishment of purpose.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished³.

Bailee's responsibility when goods not duly delivered.

161. If, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time⁴.

Death ends gratuitous bailment.

162. A gratuitous bailment⁵ is terminated by the death either of the bailor or of the bailee⁶.

Bailor entitled to profit from goods bailed.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration.

A leaves a cow in the custody of B to be taken care of. The

¹ Compare sec. 70. 'Necessary' would probably be construed to mean 'reasonable.'

² Story, Bailments, sec. 258.

³ This section must be read with secs. 24, 152, and 170. As to suits against bailees, see Act XV of 1877.

⁴ As to whether this section applies to common carriers, see 10 Cal. 213.

⁵ A mandate, deposit, or gratuitous loan.

⁶ But where there are joint bailors or joint-bailees and one of them dies, sec. 42 would seem to apply.

cow has a calf. *B* is bound to deliver the calf as well as the cow to *A*.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them. Bailor's responsibility to bailee.

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary ¹. Bailment by several joint owners.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery ². Re-delivery to bailor without title.

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court ³ to stop the delivery of the goods to the bailor, and to decide the title to the goods ⁴. Third person claiming goods bailed.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it ⁵. Right of finder of goods.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it— When finder of thing commonly on sale may sell it.

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

¹ Here the Act differs from the Civil Law, the English law (*May v. Harvey*, 13 East, 197), the Hindu law, and the Muhammadan law.

² See the Evidence Act, sec. 117.

³ by suit against the bailor and bailee.

⁴ And the bailee himself may institute an interpleader suit under the Code of Civil Procedure, c. xxxiii.

⁵ Story on Bailments, sec. 121 a.

Bailee's
particular
lien.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed¹, he has, in the absence of a contract to the contrary², a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them³.

Illustrations.

(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give *A* three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

General
lien of
bankers,
factors,
wharf-
ingers,
attorneys,
and policy
brokers.

171. Bankers, factors, wharfingers⁴, attorneys of a High Court⁴, and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods⁵ bailed to them⁶; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect⁷.

BAILMENT OF PLEDGES.

'Pledge,'
'pawnor,'
'pawnee'
defined.

172. The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge.' The bailor is in this case called the 'pawnor.' The bailee is called the 'pawnee.'

¹ This excludes bailments for mere custody, as, for example, where *A* receives *B*'s cattle to graze.

² But see 6 All. 139. Where a person does work under an entire contract with reference to goods delivered at different times, such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract, 8 Cal. 312, following *Chase v. Westmore*, 3 M. & S. 180.

Of course if the bailee once parts with the possession of the goods he loses his lien⁸.

³ Owners of a screw-house, who have a wharf as an accessory, are not wharfingers, 8 Cal. 315.

⁴ This does not give attorneys an absolute lien: it must be read with the saving in sec. 1, of the usages and customs of trade, 6 Cal. 5; 4 Bom. 353 (lien on translations). As to their charging-lien on estates recovered or reserved by suit, see 10 Bom. 248.

⁵ of the bailor, it is to be supposed.

⁶ in their respective capacities, as such bankers, factors, etc.?

⁷ As to the lien of salvors, see 6 N. W.P. 311. That a mere letter of boats for hire has not a lien for his hire upon goods placed in the boats, see 5 N. W. P. 160.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pawnee's
right of
retainer.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee ¹.

Pawnee
not to
retain
for debt
other than
that for
which
goods
pledged.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses ² incurred by him for the preservation of the goods pledged ³.

His right
to extra-
ordinary
expenses.

176. If the pawnor makes default in payment of the debt ⁴, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale ⁵.

His
right where
pawnor
makes
default.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he ⁶ may redeem

Defaulting
pawnor's
right to
redeem.

¹ Story, Eq. Jur., ii. sec. 1034.

² e.g. the cost of curing a pawned horse which meets with an injury by accident.

³ For ordinary expenses so incurred he has his lien under sec. 173, and perhaps a suit under sec. 70.

⁴ This probably means the principal debt and the interest (if any) due thereon.

⁵ And the Act does not forbid the pawnee to buy at the sale the thing pledged.

⁶ or, apparently, if he die before the sale, his representatives; Story, Bailments, sec. 348. So if the pawnee die before redemption the pawnor may redeem against his representatives.

the goods pledged at any subsequent time before the actual sale of them¹; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Pledge by possessor of goods, or of documentary title to goods.

178. A person who is in possession² of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods, or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud³.

Pledge where pawnor has only a limited interest.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest⁴.

SUITS BY BAILEES OR BAILORS AGAINST WRONG-DOERS.

Suit by bailor or bailee against wrong-doer.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or compensation obtained by such suits.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

¹ See Act XV of 1877, art. 145.

² A servant entrusted by his master with the custody of goods has not 'possession' within the meaning of this section, 4 Cal. 496. But apparently a co-owner of goods in sole possession of them may under this section pledge them validly.

³ 3 Cal. 268. This section is intended to embody the Factors' Act, 5 & 6 Vic. c. 39: see 4 Cal. 499, per

Garth C.J. Would a pledge under it defeat the right of stoppage under sec. 103?

⁴ This section is at first [and at second] sight inconsistent with sec. 178, and must be taken to apply to such cases only as do not fall within its scope, as for instance where the limited nature of the pledgor's interest is known to the pledgee, Cunn. & Shepp. 371.

CHAPTER X.

AGENCY.

APPOINTMENT AND AUTHORITY OF AGENTS.

182. An 'agent' is a person employed to do any act for 'Agent' another, or to represent another in dealings with third persons ^{1.} ^{and} 'principal'. The person for whom such act is done, or who is so represented, ^{defined.} is called the 'principal.'

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, ^{Who may employ agent.} may employ an agent ^{2.}

184. As between the principal and third persons, any person ³ may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. ^{Who may be an agent.}

185. No consideration is necessary to create an agency ^{4.} ^{Consideration not necessary.}

186. The authority of an agent may be expressed or implied ^{5.} ^{Agent's authority express or implied.}

187. An authority is said to be express when it is given

¹ Cf. The Powers of Attorney Act, VII of 1882, sec. 2, and 3 Cal. 304.

² Compare sec. 11. The omission from sec. 183 of words corresponding with 'and is not disqualified from contracting,' etc., may give rise to doubt. Compare Act VII of 1882, sec. 5.

³ whether a minor, a lunatic, or an idiot.

⁴ As to the liability of a gratuitous agent, see 2 Mad. H. C. 449.

⁵ Where the law requires an agent to be appointed in a particular way, his authority cannot be 'implied.' Such requirements are contained in the Registration Act III of 1877, secs. 32, 33; in the Sea Customs Act, VIII of 1878, sec. 203; in the Companies Act, VI of 1882, Table A, 48-51; in the Presidency Banks Act, XI of 1876, sec. 57; and in the Civil Procedure Code, XIV of 1882, secs. 37, 39, 41, 465.

Definitions of express and implied authority. by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration.

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A*'s funds with *A*'s knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

Extent of agent's authority.

188. An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business¹.

Illustrations.

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt. and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Authority in emergency.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions

¹ But without authority express or implied he cannot bind his principal by an unusual contract not strictly made in the ordinary course of business, 4 Agra 196. And a mere power

to sue does not authorise an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration, 10 Bom. 18.

at Calcutta, if they will not bear the journey to Cuttack without spoiling¹.

SUB-AGENTS.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must², be employed. When agent cannot delegate.

191. A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency. 'Sub-agent' defined.

192. Where a sub-agent is properly appointed³, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal. Representation of principal by sub-agent.

The agent is responsible to the principal for the acts of the sub-agent: Responsibility for sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong. His responsibility.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal. Agent's responsibility for sub-agent appointed without authority.

194. Where an agent, holding an express or implied au- Relation between

¹ So the master of a ship and the acceptor of a bill for the honour of the drawer may, in an emergency, borrow money on account of his employer without express authority to do so. So if *A* directs his agent *B* to place his funds in a certain bank *B* may place them in another bank if he has reason to believe that the latter bank is solvent and that the former is about to suspend business.

That an agent must in cases of diffi-

culty use all reasonable diligence in communicating with his principal, see sec. 214 *infra*.

² *Quebec &c. Railway Co. v. Quinn*, 12 Moo. P. C. C. 232.

³ 'properly appointed,' i.e. a sub-agent who may by the custom of trade or must 'from the nature of the agency' be employed (sec. 190); not an agent for part of the agency-business (sec. 194).

principal and person duly appointed by agent to act in business.

thority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.

(b) *A* authorizes *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C* & Co. *B* instructs *D*, a solicitor, to take legal proceedings against *C* & Co. for the recovery of the money. *D* is not a sub-agent, but is solicitor for *A*.

Agent's duty in naming such person.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations.

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship-surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

RATIFICATION.

Effect of ratification.

196. Where acts are done by one person on behalf of another¹, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

¹ A ratification of the unauthorised contract of an agent can only be essential when the contract has been made by the agent avowedly for, or

on account of, the principal, and not when it has been made on account of the agent himself, 6 Bom. 466, following *Wilson v. Tuman*, 6 M. & G. 236.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done. Ratification may be expressed or implied.

Illustrations.

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account; *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts¹ interest on the money from *C*. *B*'s conduct implies a ratification of the loan².

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. Knowledge requisite to valid ratification.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part. Ratifying unauthorized act part of transaction.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect. Ratifying unauthorized act cannot injure third person.

Illustrations.

(a) *A*, not being authorized thereto by *B*, demands, on behalf of *B*, the delivery of a chattel, the property of *B*, from *C* who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*³.

REVOCATION OF AUTHORITY.

201. An agency is terminated by the principal revoking

¹ i. e. knowingly accepts. See sec. 198.

² Payment to a [Hindú] mother, as manager, of a debt due on a mortgage executed to her as manager was held to bind the son who by taking no step for several years after attaining his majority might be deemed to have ratified the transaction of which

he had taken the benefit, West & B. 617.

³ *A* gives notice of the dishonour of a bill of exchange. *A* is not a party to the bill nor authorised to give notice. This notice cannot be ratified so as to bind an indorser or drawer, Story, *Agency*, § 247.

Termination of agency.

his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal¹ being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors².

Termination of agency, where agent has an interest in subject-matter.

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency³, the agency cannot, in the absence of an express contract, be terminated⁴ to the prejudice of such interest.

Illustrations.

(a) *A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority nor can it be terminated by his insanity or death⁵.

(b) *A* consigns 1000 bales of cotton to *B*, who has made advances to him on such cotton, and desires *B* to sell the cotton, and to repay himself out of the price the amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death⁶.

When principal may revoke

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his

¹ Nothing is said as to termination by efflux of time when a period is fixed for performing the business, or as to the agent's insolvency, which at all events determines his authority to receive money on behalf of his principal. The Powers of Attorney Act, 1882, sec. 3 provides that any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic or insolvent, or had revoked the power, if the fact of death, etc. was not at the time of the payment or act known to the person making or doing the same.

² Two other modes of terminating an agency are (1) where the subject-matter of the agency ceases to exist (compare sec. 56); and (2) where the principal's power over the subject-

matter comes to an end.

³ When *A* appoints *B* to be his agent to collect rents in an *inám* village and promises to pay him an annual salary out of those rents, this does not give *B* 'an interest in the property' within the meaning of section 202; 5 Bom. 253.

⁴ either by the principal's voluntary power to revoke or by his death or insanity.

⁵ *A* gives authority to *B* to recover Rs. 1000 from *C*, and declares that *B* may retain out of whatever he may recover from *C* a sum of Rs. 100 which are due to *B*. *A* cannot revoke this authority, 7 Bom. H. C., A. C. J. 10.

⁶ *A* assigns all his effects for the benefit of his creditors, and gives the assignee a power of attorney to collect and receive all debts and outstanding claims. *A* cannot revoke this power, *Walsh v. Whitcomb*, 2 Esp. 505.

agent at any time before the authority has been exercised so as to bind the principal ^{agent's authority.}¹

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency. ^{Revocation where authority has been partly exercised.}

Illustrations.

(a) *A* authorizes *B* to buy 1000 bales of cotton on account of *A*, and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payment for the cotton.

(b) *A* authorizes *B* to buy 1000 bales of cotton on account of *A*, and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name, and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause ^{Compensation for revocation by principal, or renunciation by agent.}².

206. Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. ^{Notice of revocation or renunciation.}

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively. ^{Revocation and renunciation may be expressed or implied.}

Illustration.

A empowers *B* to let *A*'s house. Afterwards *A* lets it himself. This is an implied revocation of *B*'s authority. ³

208. The termination of the authority of an agent ^{When termination}⁴ does

¹ See in England *Bromley v. Hol-land*, 7 Ves. 28.

² Otherwise where the agent takes the risk of the agency being revoked, 2 Bom. H. C. 400, 404.

As to the measure of compensation

in cases under this section, see sec. 73 *supra*.

³ or appoints *C* to let it.

⁴ whether by the principal's express revocation or by his death.

of agent's authority takes effect as to agent, and as to third persons.

not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them¹.

Illustrations.

(a) *A* directs *B* to sell goods for him, and agrees to give *B* five per cent. commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B*, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.

(b) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs *B* to send the cotton to Madras. *B*, after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *C*'s payment is good as against *A*.

(c) *A* directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes out probate to his will. *B*, after *A*'s death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor².

Agent's duty on termination of agency by principal's death or insanity.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Termination of sub-agent's authority.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

AGENT'S DUTY TO PRINCIPAL.

Agent's duty in conducting principal's business.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal³, or, in the absence of any such directions, according to the

¹ Story, *Agency*, sec. 470.

² This follows the rule of the civil law, Pollock, 37, note (d).

³ Substantial compliance with the principal's directions will be sufficient. Thus if *A* instructs his agent *B* to buy

for him 100 bales of cotton of a particular quality, and *B*, not being able to procure more than 94 bales of such cotton in the market, buys them, *A* is bound by the purchase, *Johnston v. Kershaw*, L. R. 2 Ex. 82.

custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it ¹.

Illustrations.

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations.

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London, to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g., by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A*, an insurance-broker employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission

¹ But see sec. 189, with which sec. 211 must be read.

of the clauses nothing can be recovered from the underwriter *A* is bound to make good the loss to *B*.

(*d*) *A*, a merchant in England, directs *B* his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise ¹.

Agent's
accounts.

213. An agent is bound to render proper accounts to his principal on demand ².

Agent's
duty to
communi-
cate with
principal.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions ³.

Right of
principal
when agent
deals, on
his own
account, in
business of
agency.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case show, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations.

(*a*) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(*b*) *A* directs *B* to sell *A*'s estate. *B* on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of the existence of the mine. *A*, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Benefit
gained by

216. If an agent, without the knowledge of his principal,

¹ This illustrates sec. 211 rather than sec. 213.

² As to the form of suit for an ac-

count, see 7 Cal. 654.

³ This qualifies the rule in sec. 189.

deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

agent dealing on his own account in business of agency.

Illustration.

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

217. An agent may retain¹, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right of retainer out of sums received on principal's account.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Duty to pay sums received for principal.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

When agent's remuneration becomes due.

220. An agent who is guilty of misconduct in the business of the agency², is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not entitled to remuneration for business misconducted.

Illustrations.

(a) *A* employs *B* to recover 100,000 rupees from *C*, and to lay it out on good security. *B* recovers the 100,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2000 rupees. *B* is entitled to remuneration for recovering the 100,000 rupees and for investing the 90,000 rupees. He is not

¹ Here 'retain' seems used for 'appropriate' or 'reimburse himself,' and corresponds with 'such deductions' in sec. 218. Compare the Indian Trusts Act, sec. 32. The agent's

right of *retainer* or *lien* is dealt with by sec. 221 *infra*.

² i.e. violates any duty imposed upon him by secs. 195, 211-214, and 218.

entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2000 rupees to *B*.

(b) *A* employs *B* to recover 1000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss¹.

Agent's
lien.

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable², of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same³ has been paid or accounted for to him⁴.

PRINCIPAL'S DUTY TO AGENT.

Agent to
be indem-
nified
against con-
sequences
of lawful
acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations.

(a) *B*, at Singápur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there⁵, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

Agent
to be in-
demnified

223. Where one person employs another to do an act, and the agent does the act in good faith⁶, the employer is liable to

¹ *A* employs *B* to sell 1000 bales of cotton at a price not less than Rs. 20 a maund. *B* sells the whole lot below that price. He is entitled to no commission. But if he sells 800 bales at Rs. 20 a maund and the remainder below it he is entitled to commission on the sale of the 800 bales.

² So in England through the intervention of the Court, 23 & 24 Vic. c. 27.

³ As to cases when the agent has a general lien, see sec. 170.

⁴ This section should be fused with secs. 217 and 219.

⁵ For 'there' (i.e. Calcutta) we should probably read 'Singápur.' The illustration assumes that *B* is personally bound by the contract: but this would not be the case unless *A* were resident abroad or could not be sued. (sec. 230).

⁶ See above, p. 103, note 5.

indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustrations.

(a) *A*, a decree-holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods¹ and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C*, and for *B*'s own expenses.

224. Where one person employs another to do an act which is criminal², the employer is not liable to the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.

Illustrations.

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel³ upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill⁴.

Illustration.

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

¹ in good faith.

² under the law for the time being in force in British India. In sec. 24, 'act' would probably be held to include 'forbearance.'

³ defamatory matter.

⁴ The injury must be the actual and natural and probable consequence of the principal's neglect or want of skill, and not an injury of which the neglect or want of skill of the agent or a third person was the

EFFECT OF AGENCY ON CONTRACTS WITH THIRD PERSONS.

Enforcement and consequences of agent's contracts.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person ¹.

Illustrations.

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods², and *A* cannot, in a suit by the principal, set-off against that claim a debt due to himself from *B*³.

(b) *A*, being *B*'s agent, with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

Principal how far bound, when agent exceeds authority.

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal ⁴.

Illustration.

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4000 rupees on the ship. *B* procures a policy for 4000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration.

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep

chief or proximate cause. See the *Law Quarterly Review*, ii. 416.

¹ As to the principal's liability for his agent's wrongful acts, see *L. R.*, 5 I. A. 130.

² This seems to mean that *B*'s prin-

cipal is the *only* person so entitled. But see sec. 230 (2) and sec. 233.

³ But in England see *Sims v. Bond*, 5 B. & Ad. 393.

⁴ As between the principal and third parties, see sec. 237.

and 200 lambs for one sum of 6000 rupees. *A* may repudiate the whole transaction¹.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business² transacted by him for the principal³, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Consequences of notice given to agent.

Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from *C*⁴.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Agent cannot personally enforce, nor is he bound by, contracts on behalf of principal.

Such a contract shall be presumed to exist⁵ in the following cases:—

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad:
- (2) Where the agent does not disclose the name of his principal⁶:

¹ as between himself and *B*, and also as between himself and the vendors, provided that *A* has not induced them to believe that *B* was authorised to buy the lambs as well as the sheep. See sec. 237 *infra*.

A custom allowing a broker to deviate from his instructions is unreasonable, and will not be recognised as binding by the Courts, 8 Bom. H. C., A. C. J. 19.

² It must be 'in the course of the business.' Under sec. 229 the principal is not bound where the notice is given to the agent so shortly before

'the business' that he must be presumed to recollect it.

³ *Dresser v. Norwood*, 14 C.B., N.S. 574. But this was reversed by the Ex. Ch., 17 C.B., N.S. 466.

⁴ And see sec. 104.

⁵ unless the contrary appears, 5 Cal. 79.

⁶ 5 Cal. 79; 7 Bom. 65. Where one contracting party knows that the other is contracting as an agent for a third person whose name he also knows, the presumption laid down in this clause does not arise. The essential point is the knowledge, and actual

(3) Where the principal, though disclosed, cannot be sued¹.

Rights of parties to contract made by undisclosed agent.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal².

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Performance of contract with agent supposed to be principal.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal³, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

knowledge is equivalent to disclosure, the sole object of which would be to convey such knowledge, 5 Bom. 584, 589.

Where an officer of Government makes a contract on behalf of Government, it would seem that, under this Act, he is personally liable, unless the fact that the contract was made on behalf of Government is disclosed at the time. The exemption conferred by 22 & 23 Vic. c. 41, sec. 2, appears to apply only where an instrument has been executed as there provided.

Sec. 230 (2) assumes that the agent actually has a principal. Sec. 236 deals with the case where a pretended agent has, in fact, no principal.

¹ This section is founded upon English law (Pollock, 110); but it omits to provide any fixed rule for the treatment of contracts made by an agent in writing, 6 Bom. 357. To make it correspond with English decisions, at least since *Fleet v. Murton*, L. R. 7 Q. B. 129, and *Hutchinson v. Tatham*, L. R. 8 C. P. 482, we should have to

replace subsec. (2) by words to this effect: 'Where it does not appear on the face of the contract that the agent is contracting only as agent for a principal,' Pollock, 110.

² This provides with reference to the assertion of rights by and against the undisclosed principal (1) that the principal of the agent making the contract may require specific performance from the other contracting party, and (2) that the other contracting party has, against the principal, the same rights as he would have had against the agent, if the agent had been the principal, 4 Bom. 455.

³ i. e. the principal of the agent. This section makes the right of the principal to require performance subject to the rights and obligations existing between the agent and the other contracting party, and thus qualifies the unlimited right of the principal given by the first paragraph of sec. 231; 4 Bom. 455. Sec. 232 seems covered by sec. 231.

Illustration.

A, who owes 500 rupees to *B*, sells 1000 rupees' worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off *A*'s debt.

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them¹, liable.

Right of person dealing with agent personally liable.

Illustration.

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both¹, for the price of the cotton.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively².

Inducing agent or principal to act on belief that principal or agent will be exclusively liable.

235. A person untruly representing himself to be the authorized agent of another³, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing⁴.

Liability of pretended agent.

236. A person with whom a contract has been entered into in the character of agent, is not entitled to require the per-

Person falsely contracting as agent,

¹ But their liability is several, not joint, Story, *Agency*, § 266.

² *Thomson v. Davenport*, 9 B. & C. 78, and see 6 Bom. 358. Sec. 234 imposes a further qualification upon the rights given to the other contracting party by the second portion of the first paragraph of sec. 231; 4 Bom. 456. Some words such as 'to the extent that the agent or principal has acted on such belief' seem required at the end of sec. 234. As it stands, if *A* sells cotton to *B* for Rs. 1200 payable in a month, and *B* is agent for *C*, an undisclosed principal,

and *C*, being induced by *A* to believe that *A* looks only to *B* for the price, pays *B* Rs. 500 on account, *A* could not sue *C* for the balance of Rs. 700. See Macrae, *The Indian Contract Act*, 179.

³ This does not apply to the case where *A* contracts as the agent of *B*, who is dead at the time, but of whose death *A* is unaware. See sec. 208.

⁴ 7 Bom. 65: *Colten v. Wright*, Smith, L.C., 7th ed. ii. 381. As to the measure of damages, see Mayne, 4th ed., 320-326.

not entitled to performance.

Liability of principal inducing belief that agent's unauthorized acts were authorized.

formance of it, if he was in reality acting, not as agent, but on his own account ¹.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority ².

Illustrations.

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C*, being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

Effect, on agreement, of misrepresentation or fraud by agent.

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals ³.

Illustrations.

(a) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorized by *B* to make. The contract is voidable, as between *B* and *C*, at the option of *C*.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

¹ This assumes that the pretended agent has, in fact, no principal. Where an agent has a principal, though undisclosed, the agent may enforce the contract, sec. 230 (2).

² This makes no distinction between the case of a general, and that of a special, agent; see Story, Agency,

§ 127, note 2.

³ It makes no difference whether the principal is a natural person or a corporation. On the whole, there seems to be no room for serious doubt that the law of England as now settled is correctly expressed by this section. Pollock, 531.

CHAPTER XI.

OF PARTNERSHIP.

239. 'Partnership' is the relation which subsists between 'Partner. persons who have agreed to combine their property, labour, ^{ship'} or skill in some business, and to share the profits thereof ^{defined.} between them.

Persons who have entered into partnership with one another ^{Firm} are called collectively a 'firm.' ^{defined.}

Illustrations.

(a) *A* and *B* buy 100 bales of cotton, which they agree to sell for their joint account; *A* and *B* are partners in respect of such cotton.

(b) *A* and *B* buy 100 bales of cotton, agreeing to share it between them. *A* and *B* are not partners.

(c) *A* agrees with *B*, a goldsmith, to buy and furnish gold to *B*, to be worked up by him and sold, and that they shall share in the resulting profit or loss. *A* and *B* are partners.

(d) *A* and *B* agree to work together as carpenters, but that *A* shall receive all profits and shall pay wages to *B*. *A* and *B* are not partners.

(e) *A* and *B* are joint owners of a ship. This circumstance does not make them partners¹.

240. A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits², does not, of itself, constitute the lender a partner, or render him responsible as such³. Lender not a partner by advancing money for share of profits.

241. In the absence of any contract to the contrary, property left by a retiring partner, or the representative Property left in business by

¹ 8 Cal. 1013.

² 4 All. 74. As to the Arabic origin of partnership *en commandite*,

see *Rev. Critique*, 17th May, 1886.

³ 3 Ben. A. C. J. 238: 10 Ben. 312:

4 All. 74.

retiring partner, or deceased partner's representative.

Servant or agent remunerated by share of profits.

Widow or child of deceased partner receiving annuity out of profits.

Person receiving portion of profits for sale of good-will.

Person leading another to believe him partner. Person permitting himself to be represented as partner. Minor partner.

of a deceased partner, to be used in the business, is to be considered a loan within the meaning of the last preceding section.

242. No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

243. No person, being a widow or child of a deceased partner of a trader, and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

244. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities¹.

245. A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm.

246. Any one consenting to allow himself to be represented as a partner, is liable, as such, to third persons who, on the faith thereof, give credit to the partnership².

247. A person who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm³.

¹ 3 Ben. A. C. J. 238 : 10 Ben. 312. This and the four preceding sections are taken from Bovill's Act, 28 & 29 Vic. c. 86, which had previously been extended to India by Act XV of 1866.

² See the Evidence Act, sec. 109,

as to the burden of proving that persons who have once acted as partners have ceased to stand in that relationship to one another.

³ Sec. 253, cl. (2) applies to minor as well as to adult partners. Therefore, as regards his co-partners, a

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248. A person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.

Liability of minor partner on attaining majority.

249. Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner¹.

Partner's liability for debts of partnership.

250. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud² of any partner in the management of the business of the firm.

Partner's liability for neglect or fraud of co-partner.

251. Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose³.

Partner's power to bind co-partners.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement⁴.

Illustrations.

(a) *A and B trade in partnership, A residing in England, and*

minor claiming his share of the profits must contribute towards the losses. When the ancestral trade of a Hindú was carried on after his death for the benefit of his minor children by their guardian, and debts were incurred by the firm in the course of business, the Calcutta High Court, following the analogy of the rule in sec. 247, held that the minors' shares were, but the minors personally were not, liable for these debts, 3 Cal. 738.

¹ So 3 Cal. 231, 234, where it was also held that there is no customary lien on an indigo-factory, or on its

produce, in respect of any debt of the factory.

² Why only 'neglect or fraud'? 'wrongful act or omission' is probably intended. The firm, not 'every partner,' should be liable in such cases.

³ 2 Moo. I. A. 487, where a mortgage of a village which was partnership property made by some of the partners for the benefit of the firm was held binding on a member of the firm, though not executed by him.

⁴ or not knowing him to be a partner. The Act does not say who may give the notice.

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B in India. *A* draws a bill of exchange in the name of the firm. *B* has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b) *A*, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill¹.

(c) *A* and *B* carry on business in partnership as bankers. A sum of money is received by *A* on behalf of the firm. *A* does not inform *B* of such receipt, and afterwards *A* appropriates the money to his own use. The partnership is liable to make good the money.

(d) *A* and *B* are partners. *A*, with the intention of cheating *B*, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

Annulment of contract defining partners' rights and obligations.

252. Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them, which consent must either be expressed or be implied from a uniform course of dealing.

Illustration.

A, *B* and *C*, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the nett profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, *A* receiving one-half of the nett profits, and the other half being divided equally between *B* and *C*. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

Rules determining partners' mutual relations, where no contract to contrary.

253. In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules :—

(1) All partners are joint owners² of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes³ of the partnership business. All such property is called partnership property. The share of each partner in the partnership

¹ For it is no part of the ordinary business of such a firm to draw etc. bills of exchange.

² This should be either 'owners in

common' or 'joint owners without benefit of survivorship.'

³ The words 'and in the course of' seem wanted.

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property is the value of his original contribution, increased or diminished by his share of profit or loss :

(2) All partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership :

(3) Each partner has a right to take part in the management of the partnership business¹ :

(4) Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business² :

(5) When differences arise as to ordinary matters connected with³ the partnership business, the decision shall be according to the opinion of the majority of the partners⁴ ; but no change in the nature of the business of the partnership can be made⁵, except with the consent of all the partners⁶ :

(6) No person can introduce a new partner into a firm without the consent of all the partners⁷ :

(7) If, from any cause whatsoever, any member of a part-

¹ There may of course be (and there often is) a 'contract to the contrary,' that the management of the partnership affairs shall be confided to one or more of the partners exclusively of the others, Lindley, i. 541.

² This rule, like the preceding, may be and often is departed from by express agreement. The second branch of it does not prevent a partner from recovering compensation for the extra trouble thrown on him by a co-partner who has disregarded the first branch by wilful inattention to business, 29 Beav. 620 : Pollock, Ptp. 63.

³ i. e. matters in the ordinary course of

⁴ The decision must be arrived at in good faith for the interest of the firm as a whole, and not for the private interest of all or any of the majority. Where the partners are equally divided the rule is that those who negative the change prevail, 1 Crom. & M. 345.

⁵ or the place where it is carried on.

⁶ The rule extends to powers conferred on a majority of the partners by express agreement, Pollock, Ptp. 64.

⁷ The reason is that the contract of partnership is presumed to be founded

on personal confidence between the partners, and therefore not to admit of its rights and duties being transferred as a matter of course to representatives or assignees, Pollock, Ptp. 64. An unauthorised attempt by one partner to admit a new member into the firm otherwise than by assignment of his share, would have at most the effect of creating a *sub-partnership* between himself and the new person; that is, there would be as between themselves a partnership in his share of the profits of the original firm. But as against the original firm itself the newcomer would have no rights whatever, Lindley, i. 54 : Pollock, Ptp. 65. The effect is, not to render an assignment of a share in a partnership illegal or void as between the parties to the assignment; but only so far void, as between those parties and the other partner or partners, as to cause an immediate dissolution, 10 Cal. 672.

Of course the interest of all or any of the partners may by express agreement be made assignable or transmissible, and such agreement may be embodied once for all in the original constitution of the partnership, Lindley, i. 699.

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nership ceases to be so, the partnership is dissolved as between all the other members :

(8) Unless the partnership has been entered into for a fixed term, any partner may retire from it at any time¹ :

(9) Where a partnership has been entered into for a fixed term, no partner can, during such term, retire, except with the consent of all the partners², nor can he be expelled³ by his partners for any cause whatever, except by order of Court :

(10) Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner⁴.

When
Court may
dissolve
partner-
ship.

254. At the suit of a partner the Court may dissolve the partnership in the following cases :—

(1) When a partner becomes of unsound mind :

(2) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors⁵ :

(3) When a partner, other than the partner suing, has done any act by which the whole interest of such partner⁶ is legally transferred to a third person :

(4) When any partner becomes incapable⁷ of performing his part of the partnership contract :

(5) When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership⁸ or towards his partners⁹ :

¹ He should give express notice of his intention to do so to each of the other partners.

² or in the exercise of an option previously conferred by express agreement.

³ Whether there is or is not a fixed term, he cannot be expelled by his partners unless a power to do so has been conferred by express agreement. Where there is such power it must be exercised only in good faith, and the partner sought to be expelled must have an opportunity of being heard, Lindley, ii. 844 : Pollock, Ptp. 66.

⁴ An ancestral trade may descend, like other inheritable property, upon the members of an Hindú undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death

of one of the partners does not dissolve the partnership. Nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses, 5 Bom. 40, per M. Melvill J.

⁵ Then the insolvent partner's interest is transferred to a third person (the assignee) and the case comes under clause (3).

⁶ in the partnership property or profits. Nothing is said of a partner incurring his interest.

⁷ permanently incapable.

⁸ i. e. breach of the duties specified in secs. 257, 258, expressly imposed by the partnership contract, or impliedly imposed by usage in partnerships doing a similar business.

⁹ i. e. misconduct which renders it practically impossible for the co-partners to continue to work with

mutual
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(6) When the business of the partnership can only be carried on at a loss¹.

255. A partnership is in all cases dissolved by its business being prohibited by law².

Prohibition of partnership business.

256. If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner³.

Rights and obligations of partners in partnership continued after expiry of term.

257. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

General duties of partners.

the offending partner. Thus the adultery of one partner with the wife of his co-partner is ground for dissolution, *Abbot v. Crump*, 5 Ben. 109.

The expectation of profit is implied in every partnership. If, then, a partnership is entered into for a term of years, or if the partners contract with each other that one of them shall manage the business during his lifetime, and the business cannot be carried on except at a loss, the Court may dissolve the partnership, 1 Bos. 468, 474.

When a partnership is wound up by the Court, all questions arising between the partners out of the partnership transactions should be disposed of in the winding-up suit, 8 Bos. H. C., O. C. J. 209.

Dissolution by order of the Court takes effect as from the date of the judgment, unless ordered on the ground of a specific breach of duty giving the innocent member or members a right to dissolve the partnership, in which case alone it may relate back to the event, 17 Ch. D. 529.

² or for the members of the firm to carry it on in partnership. The following illustrations of this rule are taken

from Pollock on Partnership, p. 75:—

(a) *A* and *B* charter a ship to go to a foreign port and receive a cargo on their joint adventure. War breaks out between England and the country where the port is situate before the ship arrives at the port and continues until after the time appointed for loading. The partnership between *A* and *B* is dissolved.

(b) *A* is a partner with ten other persons in a certain business. An Act is passed which makes it unlawful for more than ten persons to carry on that business in partnership. The partnership of which *A* was a member is dissolved.

(c) *A*, an Englishman and domiciled in England, is a partner with *B* a domiciled foreigner. War breaks out between England and the country of *B*'s domicile. The partnership between *A* and *B* is dissolved.

³ A continuance of the business by the acting partner or partners without any settlement or liquidation of the partnership affairs is presumed to be a continuance of the partnership 4 D. F. J., 474; Pollock, Ptp. 68.

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Account,
to firm, of
benefit
derived
from trans-
action
affecting
partner-
ship.

258. A partner must account to the firm for any benefit derived¹ from a transaction affecting² the partnership³.

Illustrations.

(a) *A, B and C* are partners in trade. *C*, without the knowledge of *A* and *B*, obtains for his own sole benefit a lease of the house in which the partnership business is carried on. *A* and *B* are entitled to participate, if they please, in the benefit of the lease.

(b) *A, B and C* carry on business together in partnership as merchants trading between Bombay and London. *D*, a merchant in London, to whom they make their consignments, secretly allows *C* a share of the commission which he receives upon such consignments, in consideration of *C*'s using his influence to obtain the consignments for him. *C* is liable to account to the firm for the money so received by him⁴.

Obligations,
to firm, of
partner
carrying on
competing
business.

259. If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

Revocation
of con-
tinuing
guarantee
by change
in firm.

260. A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given⁵.

Non-liability
of
deceased
partner's
estate.

261. The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death⁶.

¹ i.e. derived by him without the consent of the other partners.

² concerning.

³ or from any use by him of the partnership property, name, or business connexion. This rule applies to transactions undertaken after a partnership has been dissolved by the death of a partner, and before its affairs have been completely wound up, either by any surviving partner, or by the representatives of the deceased partner, Pollock, Ptp. 70. And see the Trusts Act, infra, sec. 88.

⁴ Where after a partnership has been dissolved by the death of a

partner, and before the affairs thereof have been completely wound up, such transaction has been undertaken either by any surviving partner or by the representatives of the deceased partner, the rule laid down by this section applies to such transaction.

⁵ See the less concisely worded provision in 19 & 20 Vic. c. 97, sec. 4.

⁶ There is a similar rule as to the estate of a partner who becomes bankrupt or who, not having been known to the creditor to be a partner, retires from the firm, Lindley, i. 404, 405.

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262. Where there are joint debts due from the partnership, **Payment** and also separate debts due from any partner, the partnership **of partner-** property must be applied in the first instance in payment of **ship-debts,** the debts of the firm, and if there is any surplus, then the **and of** share of each partner must be applied in payment of his **separate** separate debts or paid to him. The separate property of any **debts.** partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

263. After a dissolution of partnership, the rights and ob- **Continu-** ligations of the partners continue in all things necessary for **ance of** winding-up the business of the partnership ¹. **partners'** **rights etc.** **after dis-** **solution.**

264. Persons dealing with a firm will not be affected by a **Notice of** dissolution, of which no public notice has been given, unless **dissolution.** they themselves had notice of such dissolution ².

265. Where a partner is entitled to claim a dissolution of **Right of** partnership, or where a partnership has terminated, the Court **partners** may, in the absence of any contract to the contrary, wind up **to apply** the business of the partnership, provide for the payment of its **for wind-** debts, and distribute the surplus according to the shares of the **ing-up** **by Court.** partners respectively ³.

266. Extraordinary partnerships, such as partnerships with **Limited** limited liability, incorporated partnerships, and joint-stock **liability** companies, shall be regulated by the law for the time being **partner-** in force relating thereto ⁴. **ships, and** **joint-stock** **companies.**

¹ i.e. for settling and liquidating existing demands and for completing transactions begun but unfinished at the time of the dissolution.

² For conjectures as to the meaning of this section see 8 Cal. 683, 684. The effect seems to be that all persons dealing with a firm, whether old or new customers, see sec. 208, are bound by 'public notice' of its dissolution, and that when such notice has been given (by advertisement in gazettes or otherwise) the special notice to which old customers have hitherto been entitled (Lindley, Ptp. 4th edit. p. 415) is dispensed with. This can hardly have been intended, see 1 Agra, 198.

³ Sec. 265 is here printed as amended by Act IV of 1886. See form of plaint, Civ. Proc. Code, schedule No. 113.

⁴ See the Indian Companies Act, 1882, the Presidency Banks Act, and the Acts relating respectively to the Bengal Bonded Warehouse, the Oriental Gas Company, the Comptoir d'Escompte de Paris, and the Madras Equitable Assurance Society. See, too, the public and private statutes relating to Indian Railway Companies, the Red Sea and India Telegraph Company, the East India Coal Company, and the Assam (Tea) Company.

SCHEDULE.

ENACTMENTS REPEALED.

Statutes.

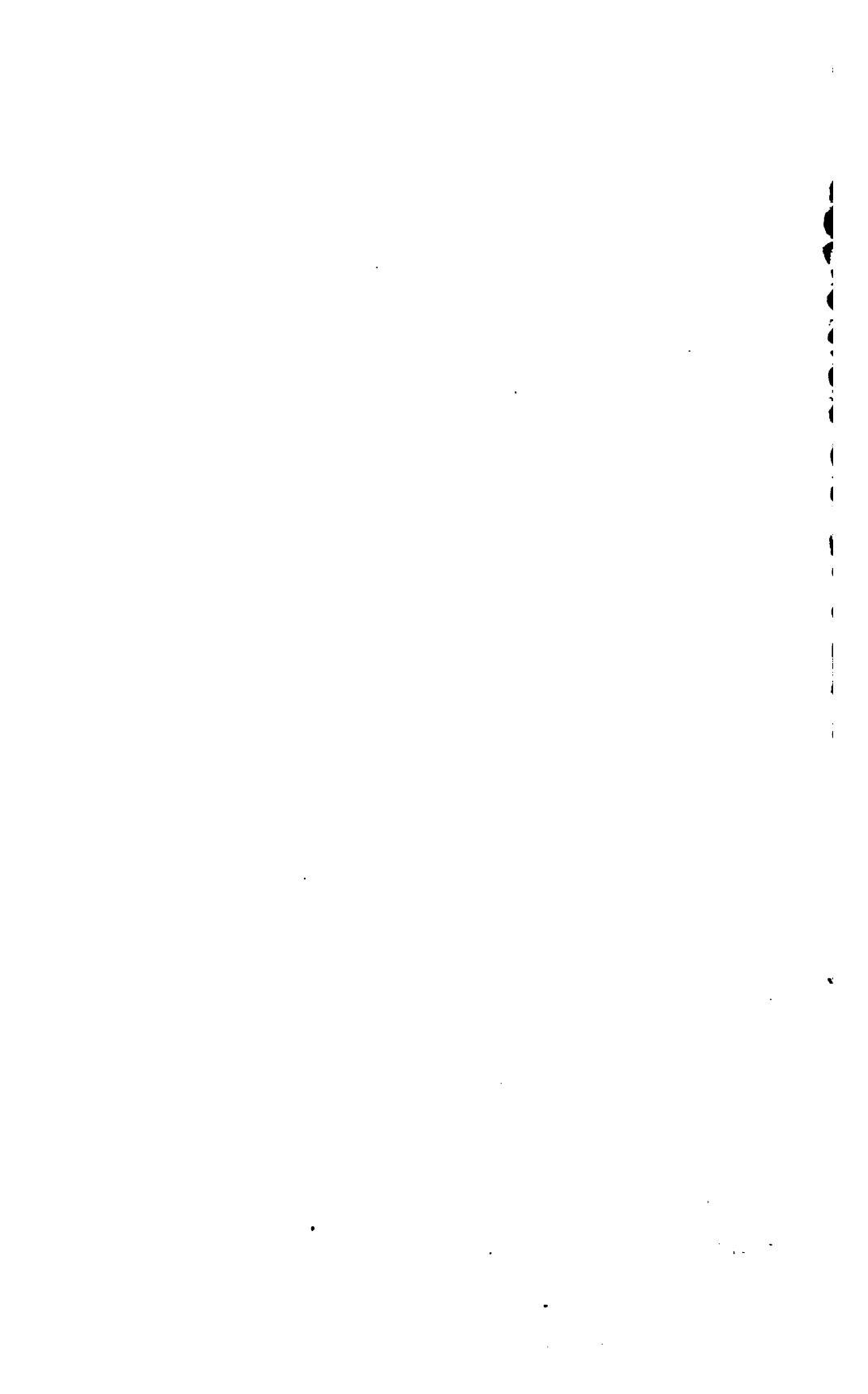
No. and year of Statute.	TITLE.	Extent of repeal.
Stat. 29 Car. II, cap. 3.	An Act for prevention of Frauds and Perjuries.	Sections one, two, three, four, and seventeen.
Stat. 11 & 12 Vic., cap. 21.	To consolidate and amend the law relating to insolvent debtors in India.	Section forty-two.

Acts.

No. and year of Act.	TITLE.	Extent of repeal.
Act XIII of 1840.	An Act for the amendment of the law regarding factors, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 4 Geo. IV, chap. 83, as altered and amended by the Statute 6 Geo. IV, chap. 94.	The whole.
Act XIV of 1840.	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 9 Geo. IV, chap. 14.	The whole.

Acts.

No. and year of Act.	TITLE.	Extent of repeal.
Act XX of 1844.	An Act to amend the law relating to Advances <i>bonâ fide</i> made to Agents intrusted with goods, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 5 & 6 Victoria, c. 39, as altered by this Act.	The whole.
Act XXI of 1848.	An Act for avoiding Wagers . .	The whole.
Act V of 1866	An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India.	Sections nine and ten.
Act XV of 1866.	An Act to amend the law of Partnership in India.	The whole.
Act VIII of 1867.	An Act to amend the law relating to Horse-racing in India.	The whole.



INTRODUCTION TO THE NEGOTIABLE INSTRUMENTS ACT.

THIS Act codifies the law relating to the chief negotiable instruments, that is to say, bills of exchange, promissory notes and cheques, which law, except in the case of the Native bills called *hundis*, was and substantially is the same in India as in England. It reduces to an Act of only 137 sections about 3100 judicial decisions which have been estimated to occupy about 35,000 pages, and which are scattered through nearly 2000 volumes of Reports hardly to be found in India outside the Bar-libraries in the Presidency Towns. It does not deal with negotiable bonds or scrip¹, bills of lading², or dock-warrants³.

The Act is divided into sixteen chapters.

Chapter I contains, besides the usual preliminary matter, a saving of local usages relating to instruments in an oriental language, and a proviso that such usages may be excluded by any words in the body of the instrument, which indicate an intention that the legal relations of the parties thereto shall be governed by the Act. As the Presidency Banks and other large dealers in *hundis* refuse to buy such instruments unless the usages in question are excluded, the result of this proviso will doubtless be that the practice of the Native mercantile community as to negotiable paper will ultimately become identical with that of their European and East Indian fellow-subjects. An eminent critic of the Bill⁴ which afterwards became Act XXI of 1881 said that he could not

¹ As to these see *Gorgier v. Mievill*, 3 B. & C. 45; *Goodwin v. Roberts*, 10 L. R. Ex. 337; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194. Debentures are not promissory notes, *British India S. N. Co. v. Inland Rev. Commrs.*, 7 Q. B. D. 165. Nor are coupons for interest, whether attached or not to the debentures, *Enthoven v. Hoyle*, 13 C. B. 373. And it has lately been held in England that Post Office orders are not negotiable. The Act is also silent as to cotton

supply cotton to the order of A in consideration of specified advances by A. In certain parts of India these *sattis* are (or lately were) regarded as negotiable.

² See as to the rights of the consignee or indorsee of these instruments, Act IX of 1856, secs. 1-3, and the Contract Act, supra, secs. 78, 102, 103, 108, exc. 1.

³ See the Contract Act, supra, secs. 108, 178.

⁴ Sir James Stephen.

see why uniformity of practice was desirable. The reasons are that it prevents uncertainty and litigation as to what has been called the most cosmopolitan of all contracts, and that it facilitates dealings not only between English and Native merchants, but between Native merchants in different parts of India. The practical working of a system of credit is made safer and more beneficial when the bills of exchange under which a banker or merchant is responsible are governed by precisely the same legal conditions as those on which he was a creditor, and in reference to which the others were issued or accepted.

The Act also declares that nothing contained in it affects the Indian Paper Currency Act, 1871, sec. 21, now represented by Act XX of 1882, sec. 25. of the following section of Act XX of 1882: 'No body corporate or person in British India shall draw, accept, make or issue any bill of exchange, hundí, promissory note, or engagement for the payment of money payable to bearer on demand, or borrow, owe, or take up any sum or sums of money on the bills, hundís or notes payable to bearer on demand, of any such body corporate or of any such person :

' Provided that cheques or drafts payable to bearer on demand or otherwise may be drawn on bankers, shroffs or agents by their customers or constituents in respect of deposits of money in the hands of those bankers, shroffs or agents and held by them at the credit and disposal of the persons drawing such cheques or drafts.'

The rest of the Act is a recast of a draft Bill prepared in England by the Indian Law Commission¹, which in December 1867 was introduced to the Council of the Governor General by the Right Hon. W. N. Massey and referred to a Select Committee. The then mercantile members of Council (Mr. Steuart Gladstone and Mr. Skinner), while admitting the desirability of codification, objected to the Bill on account of its numerous deviations from English and Anglo-Indian mercantile law. The Bill, for instance—

(a) discarded days of grace ;

(b) did not except a person becoming, in good faith and for consideration, the holder of an overdue accommodation bill from the rule that an indorsee for value after maturity should have only the rights of his indorser ;

(c) made all instruments falling due on a holiday payable on the next succeeding business day ;

¹ Their report dated 24 July, 1867, is signed by Lord Romilly, Sir E. Ryan, Mr. Robert Lowe, Sir Robert

Luah, Sir John M. Macleod, and Sir W. M. James.

(d) made no provision for the case in which interest at a specified rate is expressly made payable on a note or bill ;

(e) omitted the rule that a notice of dishonour must inform the party to whom it is given that he will be held liable ;

(f) made no provision for a suit against the indorser of a lost bill ;

(g) discharged the acceptor, maker or indorser of an instrument payable to *order* by payment to any person in possession of the instrument.

The Bill, moreover, contained no saving of the customs of Native merchants regarding *hundis* ; and its definitions might have given rise to difficulty. Thus according to them, a bill of exchange differs from a cheque only in requiring that the money ordered by the instrument to be paid should be held at the disposal of the drawer. The definition of cheque would include a tradesman's bill on which the debtor writes, for presentation to a cash-keeper, an order to pay¹. Such an instrument would apparently be negotiable—a rather serious result. Again, the definition of a 'cheque' does not require that it should be drawn on a banker or a person acting as such, nor that it should be payable on demand.

During his tenure of office as law-member Mr. (now Lord) Hobhouse perused the Bill, discovered a number of changes and omissions which had escaped the mercantile members ; and satisfied himself that the Bill, if it were to go on at all, must be completely redrawn. The Bill was therefore altered, added to, rearranged and (except as to the illustrations and the chapters on compensation and international law) practically redrawn by Mr. Arthur Phillips, of the Calcutta Bar, then Secretary to the Government of India in the Legislative Department. His work was repeatedly revised by Select Committees aided by the criticisms received from the Chambers of Commerce at Calcutta, Madras, Bombay, and Rangoon, and the managers of the principal Indian banks. It was also revised by the Indian Law Commission of 1879. Having been just fourteen years under consideration it was passed in 1881 ; and, to judge from the fewness of the reported decisions upon it and the moderate amount of amending legislation found necessary during the past five years, it has been a highly successful measure.

Chapter II contains definitions of the technical words used in the Act. Of these definitions that of 'holder' has been much criticised ; and it might be well replaced by 'the payee or indorsee

¹ This is the ordinary mode of paying bills in mercantile houses, at least in Calcutta, and is adopted by many private persons.

of a bill of exchange or promissory note who is in possession of it, or, when the bill or note is payable to bearer, the person in possession of it' (compare 45 & 46 Vic. c. 61, sec. 2). Chapter II also contains rules as to ambiguous instruments (sec. 17); as to the case where the amount is stated differently in figures and in words¹ (sec. 18); as to when notes and bills specifying no time for payment are payable (sec. 19); as to inchoate stamped instruments (sec. 20); as to days of grace (sec. 22); as to calculating maturity (secs. 23, 24); and as to notes and bills maturing on public holidays (sec. 25). In such case the instrument is deemed to be due always on the next *preceding* business day, and not, as in England, sometimes on the preceding, sometimes on the succeeding, business day².

Chapter III deals with the parties to notes, bills and cheques, their capacity and respective liabilities. It declares (sec. 26) that a minor may draw, indorse, deliver and negotiate such instruments so as to bind all parties except himself. It also rules (sec. 35) that every indorser after dishonour is liable as upon an instrument payable on demand. To this chapter, Act II of 1885 has added a section (45*a*) declaring the holder's right to a duplicate of a bill lost before it is overdue, and copied from 45 & 46 Vic. c. 61, sec. 69.

Chapter IV deals with negotiation. It closely reproduces the English law on the subject.

Chapter V—of Presentment—substantially reproduces the English law relating to presentment for acceptance and presentment for payment. It has been recently amended by inserting in secs. 61 and 64 a statement that 'where authorised by agreement or usage, a presentment through the post office *by means of a registered letter* is sufficient.' This is equivalent to 45 & 46 Vic. c. 61, sec. 41 (1), (2), and sec. 45 (8), except that the English code does not require registration.

Chapter VI treats of payment and interest, and Chapter VII of discharge from liability. In the latter chapter sec. 85 declares that where a cheque payable to order purports to be indorsed by or on behalf of *the payee*, the drawee is discharged by payment in due course. This is taken from the English enactment 16 & 17

¹ The Law Commission of 1879 thought that this section should be extended so as to meet cases of error not uncommon in Native documents purporting to specify the sum, its half, and the double of the half.

² Byles, 278: 45 & 46 Vic. c. 61, sec. 14. The French Code de Commerce, (l. i. tit. 8. art. 134), like the Indian Act, puts all non-business days on the same footing.

Vic. c. 59, sec. 19, which, however, contains the words 'any subsequent indorsement.' The omission from the Indian Act of any corresponding words has given rise to the doubt whether the protection afforded by sec. 85 extends to any indorsement other than that of the original payee¹. Material alteration made by a stranger avoids a bill—the Act here following English decisions. The rule in sec. 90, as to the extinguishment of rights of action on a negotiated bill held, at or after maturity, by the acceptor in his own right should certainly be extended to notes.

Chapter VIII treats of notice of dishonour, and Chapter IX of noting and protest. The latter Chapter has been recently improved by Act II of 1885. But it still contains no provision for drawing up a protest when the services of a notary cannot be obtained. The English Bills of Exchange Act, 1882, contains, in sec. 94, the requisite provision.

Chapter X contains rules for calculating the reasonable time for presentment for acceptance or payment, for giving notice of dishonour, and for noting. It lacks a rule as to reasonable time for protesting a dishonoured note or bill (sec. 100).

Chapter XI deals with acceptance and payment for honour.

Chapter XII treats of the compensation payable in case of dishonour, and also of the return-bills commonly called redrafts. It provides for a case omitted in the corresponding section (57) of the English code, that, namely, of a drawer of a bill in a foreign country accepted in England and subsequently dishonoured and protested².

Chapter XIII, entitled Special Rules of Evidence, contains rules as to certain rebuttable presumptions as to negotiable instruments and lost notes, bills and cheques, and declares the estoppels as to (a) denying the original validity of a note, bill or cheque, (b) denying a payee's capacity to indorse, and (c) denying the signature or capacity of prior parties.

Chapter XIV contains rules as to crossed cheques corresponding with those contained in 39 & 40 Vic. c. 81, secs. 4, 5, 7-10, 12.

Chapter XV consists of two sections on bills in sets, which correspond with the English law on the subject. See 45 & 46 Vic. c. 61, sec. 71.

Chapter XVI contains some rules on international law which may be compared with those headed '*Conflict of Laws*' in 45 & 46 Vic. c. 61, sec. 72. It will be observed that in India an indorser's liabilities are regulated by the *lex loci solutionis*. Where

¹ Chalmers, *The Negotiable Instruments Act*, p. 84.

² *In re Gillespie*, 16 Q. B. D. 702.

a negotiable instrument is made etc. in a foreign country but in accordance with British Indian law, sec. 136 declares that the circumstance that any agreement evidenced by such instrument is invalid according to the law of the foreign country does not invalidate any subsequent acceptance or indorsement made thereon in British India. I am not aware that such case has arisen in England. Mr. Chalmers supposes that sec. 136 was taken in part from the German General Exchange Law, sec. 85.

Foreign
stamp-
laws.

The Act is silent as to foreign stamp laws. It should have contained a clause like this: 'Where a bill is issued out of British India it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue¹'

Notaries.

Lastly, the Act contains a chapter added by Act II of 1885, expressly empowering the Governor-General in Council to appoint Notaries public under the Negotiable Instruments Act; to make rules for their guidance; and to fix their fees.

Other statutory provisions as to negotiable instruments will be found in the second volume of this work. They are contained

in the Stamp Act I of 1879, secs. 3, 5, 10, 11, 12, 16, 18, 19, 20, 22, 23, 27, 29, 34, 44, 51, 61, 62, 63, 66, 67; Schedule I, Nos. 11, 19, 41, 45, and Schedule II, Nos. 15, 17;

in the Limitation Act, XV of 1877, secs. 3, 4, and Schedule II, Nos. 54, 58, 69-80, 91, 92;

in the Civil Procedure Code, secs. 29 (joinder of parties liable on a bill or note), 61 (suits on lost negotiable instruments), 261, 262 (decree for indorsing negotiable instruments), 270 (attachment of negotiable instrument), 296 (execution-sale of negotiable instrument), 532-538 (summary suits on negotiable instruments); Schedule, Nos. 30-48 (forms of complaints); and

in the Evidence Act, I of 1872, s. 114, ill. (c) (presumption as to acceptance or indorsement for good consideration), sec. 117 (acceptor estopped from denying drawer's authority).

Besides these, the Companies' Act, VI of 1882, secs. 65, 67, 72, 144, contains provisions as to the execution of bills and notes by companies having power to bind themselves by negotiable instruments, and the Presidency Banks Act, XI of 1876, sec. 33, empowers certain officers of the Banks of Bengal, Madras and Bombay to endorse promissory notes and to draw, accept and endorse bills of exchange, bank post bills², and letters of credit.

¹ Compare 45 & 46 Vic. c. 72. proviso (a).

² The Indian legislature regards these instruments (which are used by

bankers for remitting money) as bills of exchange. In *Forbes v. Marshall*, 11 Exch. 167, Martin B. thought them promissory notes.

At the end of the Negotiable Instruments Act will be found Tables showing the corresponding sections of that Act and the English Bills of Exchange Act, 1882. It will be seen that the Indian Act has no sections corresponding with sections 12, 16, 18, 23, 24, 27, 40, 53, 58, 69, 70, 75, 78, 85, 90, 91, 93, 94, 95, 97-100 of the English Act, and that the English Act has no sections corresponding with the following sections of the Indian Act : 27, 31, 33, 36, 38, 39, 42, 44, 45, 57, 67, 73, 77, 80, 102, 118 (e) and (f), 119, 126, 137.

THE NEGOTIABLE INSTRUMENTS ACT, 1881.

CONTENTS.

Preamble.

CHAPTER I.

PRELIMINARY.

	SECTION
Short title	1
Local extent	<i>ib.</i>
Saving of usages relating to hundis, &c.	<i>ib.</i>
Commencement	<i>ib.</i>
Repeal of enactments	2
Interpretation-clause	3

CHAPTER II.

OF NOTES, BILLS AND CHEQUES.

'Promissory note'	4
'Bill of exchange'	5
'Cheque'	6
'Drawer,' 'Drawee,' 'Drawee in case of need,' 'Acceptor,' 'Acceptor for honour,' 'Payee'	7
'Holder'	8
'Holder in due course'	9
'Payment in due course'	10
Inland instrument	11
Foreign instrument	12
'Negotiable instrument'	13
Negotiation	14

	SECTION
Indorsement	15
Indorsement 'in blank' and 'in full,' 'Indorsee'	16
Ambiguous instruments	17
Where amount is stated differently in figures and words	18
Instruments payable on demand	19
Inchoate stamped instruments ,	20
'At sight,' 'On presentment,' 'After sight'	21
'Maturity,' Days of grace	22
Calculating maturity of bill or note payable so many months after date or sight	23
Calculating maturity of bill or note payable so many days after date or sight	24
When day of maturity is a holiday	25

CHAPTER III.

PARTIES TO NOTES, BILLS AND CHEQUES.

Capacity to make &c. promissory notes, &c.	26
Minor	<i>ib.</i>
Agency	27
Liability of agent signing	28
Liability of legal representative signing	29
Liability of drawer	30
Liability of drawee of cheque	31
Liability of maker of note and acceptor of bill	32
Only drawee can be acceptor except in need or for honour	33
Acceptance by several drawees not partners	34
Liability of indorser	35
Liability of prior parties to holder in due course	36
Maker, drawer and acceptor principals	37
Prior party a principal in respect of each subsequent party	38
Suretyship	39
Discharge of indorser's liability	40
Acceptor bound, although indorsement forged	41
Acceptance of bill drawn in fictitious name	42
Negotiable instrument made &c. without consideration	43
Partial absence or failure of money-consideration	44
Partial failure of consideration not consisting of money	45
Holder's right to duplicate of lost bill	45 A

CHAPTER IV.

OF NEGOTIATION.

	SECTION
Delivery	46
Negotiation by delivery	47
Negotiation by indorsement	48
Conversion of indorsement in blank into indorsement in full	49
Effect of indorsement	50
Who may negotiate	51
Indorser who excludes his own liability or makes it conditional	52
Holder deriving title from holder in due course	53
Instrument indorsed in blank	54
Indorsement in blank followed by indorsement in full	55
Indorsement for part of sum due	56
Legal representative cannot by delivery only negotiate instrument indorsed by deceased	57
Instrument obtained by unlawful means or for unlawful consideration	58
Instrument acquired after dishonour or when overdue	59
Accommodation note or bill	id.
Instrument negotiable till payment or satisfaction	60

CHAPTER V.

OF PRESENTMENT.

Presentment for acceptance	61
Presentment of promissory note for sight	62
Drawee's time for deliberation	63
Presentment for payment	64
Hours for presentment	65
Presentment for payment of instrument payable after date or sight	66
Presentment for payment of promissory note payable by instalments	67
Presentment for payment of instrument payable at specified place and not elsewhere	68
Instrument payable at specified place	69
Presentment where no exclusive place specified	70
Presentment when maker &c. has no known place of business or residence	71
Presentment of cheque to charge drawer	72
Presentment of cheque to charge any other person	73
Presentment of instrument payable on demand	74

	SECTION
Presentment to agent, representative of deceased, or assignee of insolvent	75
When presentment unnecessary	76
Liability of banker for negligently dealing with bill presented for payment	77

CHAPTER VI.

OF PAYMENT AND INTEREST.

To whom payment should be made	78
Interest when rate specified	79
Interest when no rate specified	80
Delivery of instrument on payment, or indemnity in case of loss	81

CHAPTER VII.

OF DISCHARGE FROM LIABILITY ON NOTES, BILLS AND CHEQUES.

Discharge from liability—(a) by cancellation; (b) by release; (c) by payment	82
Discharge by allowing drawee more than twenty-four hours to accept	83
When cheque not duly presented and drawer damaged thereby	84
Cheque payable to order	85
Parties not consenting discharged by qualified or limited acceptance	86
Effect of material alteration	87
Alteration by indorsee	ib.
Acceptor or indorser bound notwithstanding previous alteration	88
Payment of instrument on which alteration is not apparent	89
Extinguishment of rights of action on bill in acceptor's hands	90

CHAPTER VIII.

OF NOTICE OF DISHONOUR.

Dishonour by non-acceptance	91
Dishonour by non-payment	92
By and to whom notice should be given	93
Mode in which notice may be given	94

	SECTION
Party receiving must transmit notice of dishonour	95
Agent for presentment	96
When party to whom notice given is dead	97
When notice of dishonour is unnecessary	98

CHAPTER IX.

OF NOTING AND PROTEST.

Noting	99
Protest	100
Protest for better security	id.
Contents of protest	101
Notice of protest	102
Protest for non-payment after dishonour by non-acceptance	103
Protest of foreign bills	104
When noting equivalent to protest	104A

CHAPTER X.

OF REASONABLE TIME.

Reasonable time	105
Reasonable time of giving notice of dishonour	106
Reasonable time for transmitting such notice	107

CHAPTER XI.

OF ACCEPTANCE AND PAYMENT FOR HONOUR AND REFERENCE

IN CASE OF NEED.

Acceptance for honour	108
How acceptance for honour must be made	109
Acceptance not specifying for whose honour it is made	110
Liability of acceptor for honour	111
When acceptor for honour may be charged	112
Payment for honour	113
Right of payer for honour	114
Drawee in case of need	115
Acceptance and payment without protest	116

CHAPTER XII.

OF COMPENSATION.

	SECTION
Rules as to compensation	117

CHAPTER XIII.

SPECIAL RULES OF EVIDENCE.

Presumptions as to negotiable instruments	118
(a) of consideration;	<i>ib.</i>
(b) as to date;	<i>ib.</i>
(c) as to time of acceptance;	<i>ib.</i>
(d) as to time of transfer;	<i>ib.</i>
(e) as to order of indorsements;	<i>ib.</i>
(f) as to stamp;	<i>ib.</i>
(g) that holder is a holder in due course	<i>ib.</i>
Presumption on proof of protest	119
Estoppel against denying original validity of instrument	120
Estoppel against denying capacity of payee to indorsee	121
Estoppel against denying signature or capacity of prior party	122

CHAPTER XIV.

OF CROSSED CHEQUES.

Cheque crossed generally	123
Cheque crossed specially	124
Crossing after issue	125
Payment of cheque crossed generally	126
Payment of cheque crossed specially	<i>ib.</i>
Payment of cheque crossed specially more than once	127
Payment in due course of crossed cheque	128
Payment of crossed cheque out of due course	129
Cheque bearing 'not negotiable'	130
Non-liability of banker receiving payment of cheque	131

CHAPTER XV.

OF BILLS IN SETS.

Set of bills	132
Holder of first acquired part entitled to all	133

CHAPTER XVI.

OF INTERNATIONAL LAW.

	SECTION
Law governing liability of maker, acceptor or indorser of foreign instrument	134
Law of place of payment governs dishonour	135
Instrument made &c. out of British India, but in accordance with its law	136
Presumption as to foreign law	137

CHAPTER XVII.

NOTARIES PUBLIC.

Power to appoint notaries public	138
Power to make rules for notaries public	139

SCHEDULE.

ACT No. XXVI of 1881¹.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 9th December,
1881.)

An Act to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques.

Whereas it is expedient to define and amend the law re- Preamble.
lating to promissory notes, bills of exchange and cheques; It
is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. This Act may be called 'The Negotiable Instruments Short title.
Act, 1881.'

It extends to the whole of British India; but nothing Local
herein contained affects the Indian Paper Currency Act, 1871², Saving
section 21, or affects any local usage relating to any instru- of usages
ment in an oriental language³: Provided that such usages relating to
hundis, &c.

¹ Amended by Act II of 1885.

² This reference is to be deemed to
be made to Act XX of 1882.

³ This merely saves local usages (if
any), but does not exclude hundis
from the operation of the Act in
matters where there is no such usage.
For decisions as to the usage of shroffs
in Bengal, see 2 Suth. 214; 5 ibid.

86; 6 ibid. 301; 7 ibid. 154; 17 ibid.
442; Bourke, O. C. J., 151; 1 Hyde,
155; 7 Ben. 275, 289, 682; 9 Ben. 1
and Appx. 1; 3 Cal. 339; 11 Cal.
344: in Madras, see 7 Mad. H.
C. 179: in Bombay, see 6 Bom. H.
C., O. C. J. 24; 7 ibid. 137; 12 Bom.
H. C. 113; 1 Bom. 23; 3 Bom. 182;
4 Bom. 333; 10 Bom. 346; and in

may be excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by this Act;

**Commence-
ment.** And it shall come into force on the first day of March, 1882.

**Repeal
of enact-
ments.** 2. On and from that day the enactments specified in the schedule hereto annexed shall be repealed to the extent mentioned in the third column thereof.

**Interpre-
tation-
clause.** 3. In this Act—

‘Banker’ includes also persons or a corporation or company acting as bankers; and ¹

‘Notary public’ includes also any person appointed by the Governor-General in Council to perform the functions of a notary public under this Act ².

the N. W. Provinces, 4 Agra, 268; 2 N. W. R. 73; 3 *ibid.* 343; 1 All. 392; 5 All. 302, 484; 6 All. 78. It was laid down by Colville C.J. in *Amritram v. Damoodar Dass*, that where the analogy between hundis and bills of exchange is complete, and there is no proof of any special usage, it is right to apply the English law to them. Macpherson J. adopted this dictum, 2 Hyde, 261. As to the kinds of hundis see Macpherson on Contracts, sec. 621. Where a hundi is drawn or indorsed in one place and payable in another, and the usages of the two places differ, Mr. Chalmers suggests that the rules in chap. xvi, as to the conflict of laws, may be looked at by way of analogy.

Cases as to the custom of Native merchants as to promissory notes have

not often come before the Courts. But it has been ruled that by Hindú law a promissory note does not import consideration, 3 Ben. O. C. J. 130; and see 1 All. 732 (where the payee and the holder were Hindús) as to a note not made payable to any person other than the payee. A *hundi* drawn by the drawer on himself and accepted by himself has been held to be a promissory note, 7 Ben. 557.

¹ 39 & 40 Vic. c. 80, sec. 3.

² Express power to appoint notaries public, and to make rules for their guidance and control, is given by sections 138 and 139. The Indian Courts take judicial notice of their seals, Evidence Act, s. 57 (b); and as to the presumption of the dishonour of instruments protested before them, see *infra*, sec. 119.

CHAPTER II.

OF NOTES, BILLS AND CHEQUES.

4. A 'promissory note' is an instrument in writing¹ (not 'Promissory note.' being a banknote or a currency-note) containing an unconditional undertaking, signed² by the maker, to pay a certain sum of money³ only to, or in the order of, a certain person, or to the bearer of the instrument.

Illustrations.

A signs instruments in the following terms:—

- (a) 'I promise to pay *B* or order Rs. 500.'
- (b) 'I acknowledge myself to be indebted to *B* in Rs. 1000, to be paid on demand, for value received.'
- (c) 'Mr. *B*, IOU Rs. 1000.'
- (d) 'I promise to pay *B* Rs. 500 and all other sums which shall be due to him.'
- (e) 'I promise to pay *B* Rs. 500, first deducting thereout any money which he may owe me.'
- (f) 'I promise to pay *B* Rs. 500 seven days after my marriage with *C*.'
- (g) 'I promise to pay *B* Rs. 500 on *D*'s death, provided *D* leaves me enough to pay that sum.'
- (h) 'I promise to pay *B* Rs. 500 and to deliver to him my black horse on 1st of January next⁵.'

¹ This probably would be held to include printed, engraved, or lithographed, and every other mode in which words and figures can be expressed on any material.

² 'Signature' has been defined as 'the writing of a person's name on a bill or note in order to authenticate and give effect to some contract by him thereon,' Chalmers, 5. A pencilled signature is sufficient, *Geary v. Phye*, 5 B. & C. 234.

³ Where the money is expressed in a foreign currency the rate of ex-

change according to which the bill is to be paid should be mentioned in the bill. Where this is not done, the amount payable would be calculated according to the rate on the day the bill is payable, *Hirschfield v. Smith*, L. R. 1 C. P. 353.

⁴ Such a note, being payable on a contingency, could never circulate freely from hand to hand, for no one would know the nature of the security he had got, Chalmers, 11.

⁵ Here the undertaking is not to 'pay a certain sum of money only.'

The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c), (d), (e), (f), (g) and (h) are not promissory notes.

'Bill of exchange.'

5. A 'bill of exchange' is an instrument in writing containing an unconditional order, signed¹ by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer² of the instrument³.

A promise or order to pay is not 'conditional,' within the meaning of this section and section four, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain⁴.

The sum payable may be 'certain,' within the meaning of this section and section four, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a 'certain person,' within the meaning of this section and section four, although he is mis-named or designated by description only.

'Cheque.'

6. A 'cheque' is a bill of exchange drawn on a specified banker⁵ and not expressed to be payable otherwise than on demand.

'Drawer.'
'Drawee.'

7. The maker of a bill of exchange or cheque is called the

¹ See note 2, p. 675.

² Not to bearer *on demand*, *supra*, p. 660. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer, 45 & 46 Vic. 61, sec. 7.

³ It is not necessary to specify the place where it is drawn or where it is payable, nor need it be dated. Nor need it state the fact or nature of the consideration, 45 & 46 Vic. c. 61, sec. 4. Where the drawer and the drawee (sec. 7) of a bill are the same person

or firm the holder may at his option treat the instrument as a bill or as a note, *ibid.* sec. 5.

⁴ Thus, for example, a note payable ten days after the death of A, is valid. But a bill payable ten days after the arrival of the ship Z at Calcutta is invalid, for the ship may never arrive there, Chalmers, 11.

As to delivering conditionally an instrument which is absolute in form, see sec. 46.

⁵ by one of his customers.

'drawer;' the person thereby directed to pay is called the 'drawee.'

When in the bill or in any indorsement thereon the name 'Drawee' of any person is given in addition to the drawee to be re-^{in case of need.}sorted to in case of need, such person is called a 'drawee in case of need'.¹

After the drawee of a bill has signed² his assent³ upon the 'Acceptor.' bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the 'acceptor.'

When a bill of exchange has been noted or protested for 'Acceptor for honour.' non-acceptance or for better security⁴, and any person ac-cepts it *supra protest* for honour of the drawer or of any one of the indorsers, such person is called an 'acceptor for honour'.⁵

The person named in the instrument, to whom or to whose 'Payee.' order the money is by the instrument directed to be paid⁶, is called the 'payee.'

8. The 'holder' of a promissory note, bill of exchange or 'Holder.' cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

9. 'Holder in due course' means any person who for con-'Holder sideration⁷ became the possessor of a promissory note, bill of^{in due course.} exchange or cheque if payable to bearer,

or the payee or indorsee thereof, if payable to, or to the order of, a payee,

before the amount mentioned in it became payable⁸, and

¹ See secs. 115, 116, *infra*. He need not reside in the place where the bill is payable.

² See note 2, p. 675.

³ Simple signature is enough.

⁴ Act II of 1885, sec. 2.

⁵ See *infra*, secs. 108-112.

⁶ This would appear to include an

indorsee under an indorsement 'in full,' sec. 16.

⁷ See the Contract Act, *supra*, sec. 2. It is clear that a past debt is a good consideration for a bill or note given in payment of it.

⁸ In other words, the bill must not be overdue when he takes it.

without having sufficient cause to believe¹ that any defect existed in the title of the person from whom he derived his title.

‘Payment
in due
course.’

10. ‘Payment in due course’ means payment² in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned³.

Inland in-
strument.

11. A promissory note, bill of exchange or cheque drawn or made in British India, and made payable in, or drawn upon any person resident⁴ in, British India shall be deemed to be an inland instrument⁵.

Foreign in-
strument.

12. Any such instrument not so drawn, made or made payable shall be deemed to be a foreign instrument⁶.

‘Negoti-
able in-
strument.’

13. A ‘negotiable instrument’ means a promissory note, bill of exchange or cheque expressed to be payable to a specified person or his order, or to the order of a specified person, or to the bearer thereof, or to a specified person or the bearer thereof.

Negotia-
tion.

14. When a promissory note, bill of exchange or cheque is transferred⁷ to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

Indorse-
ment.

15. When the maker or holder⁸ of a negotiable instrument

¹ Mere negligence in taking a bill seems immaterial. Such, for instance, as an erasure or other irregularity patent on the face of the instrument. If a man take *honestly* an instrument made or become payable to bearer he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induce the jury to find fraud, Byles on Bills, 14th ed., 187, 188.

² of money.

³ See secs. 78 and 82 (c).

⁴ Cf. the definition of residence in Code of Civil Procedure, sec. 17.

⁵ According to this definition the following would be inland bills: 1. a bill drawn in Calcutta on Bombay, but indorsed in Egypt; 2. a bill

drawn in Calcutta on a merchant residing in Bombay, accepted payable in London; 3. a bill drawn in Calcutta upon a merchant in London, but payable in Bombay, Chalmers, 25.

⁶ As to protesting foreign bills and notes, see secs. 104, 134.

⁷ by indorsement or delivery, secs. 46-48.

⁸ Here, as in secs. 20, 46, 48, 49, and 78, ‘holder’ (notwithstanding sec. 8) seems to mean a *de facto* holder, i. e. payee, indorsee, or bearer (as the case may be), who is in possession of the instrument, whether he be entitled to receive the amount due thereon, or not. As to liability incurred by a person who is

signs¹ the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto², or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the 'indorser³.'

16. If the indorser signs¹ his name only, the indorsement is said to be 'in blank⁴,' and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be 'in full;'⁵ 'Indorsee.' and the person so specified is called the 'indorsee' of the instrument.

17. Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly.

18. If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

19. A promissory note or bill of exchange, in which no time for payment is specified, and a cheque⁶, are payable on demand.

20. Where one person signs¹ and delivers² to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument³, he thereby gives *prima facie* authority to the holder⁴ thereof to make or complete, as the case may be,

not party to a bill or note and who backs it with his signature, see *Exp. Yates*, 2 De Gex & J. 191; *Steele v. McKinlay*, L. R. 5 App. Ca. 754.

¹ See note 2, p. 675.

² commonly called an *allonge*.

³ Notwithstanding this section, the holder of a Government security shall not be said to indorse it, or to be called its indorser, if when he signs it for the purpose of negotiation he inscribes his signature for that pur-

pose elsewhere than on the back, Act XIII of 1886, sec. 6.

⁴ That a bill indorsed in blank is payable to bearer, see sec. 54.

⁵ Sec. 6.

⁶ *Baxendale v. Bennet*, L. R., 3 Q. B. D. 525.

⁷ A bill expressed to be payable 'after date' is 'incomplete' if the date be omitted, or if the acceptance be undated.

⁸ See the first note on sec. 15.

upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

21. In a promissory note or bill of exchange the expressions 'at sight,' 'On presentment,' 'After sight,' 'at sight' and 'on presentment'¹ mean on demand. The expression 'after sight' means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance, or protest for non-acceptance².

22. The maturity of a promissory note or bill of exchange is the date at which it falls due.

Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable².

23. In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated, or presented for acceptance or sight, or noted for non-acceptance, or protested for non-acceptance, or the event happens, or, where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month³.

Illustrations.

(a) A negotiable instrument, dated 29th January, 1878, is made

¹ 34 & 35 Vic. c. 74, sec. 2.

² Unless the bill otherwise provides, a bill drawn payable 'without grace' would mature on the day on

which it is expressed to be payable.

³ 'Month' here means calendar month, Act I of 1868, sec. 2, cl. (4), supra, p. 487.

payable at one month after date. The instrument is at maturity on the third day after the 28th February, 1878.

(b) A negotiable instrument, dated 30th August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

(c) A promissory note or bill of exchange, dated 31st August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

24. In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

Calculating maturity of bill or note payable so many days after date or sight.

25. When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.

When day of maturity is a holiday.

Explanation.—The expression 'public holiday' includes Sundays: New-Year's day, Christmas day: if either of such days falls on a Sunday, the next following Monday: Good-Friday; and any other day declared by the Local Government, by notification in the official Gazette, to be a public holiday.

CHAPTER III.

PARTIES TO NOTES, BILLS AND CHEQUES.

Capacity to make &c. promissory notes, &c.

26. Every person ¹ capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque.

Minor.

A minor may draw, indorse, deliver and negotiate such instruments so as to bind all parties except himself ².

Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered ³.

Agency.

27. Every person capable of binding himself, or of being bound, as mentioned in section twenty-six, may so bind himself or be bound by a duly authorized agent acting in his name ⁴.

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

Liability of agent signing.

28. An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he

¹ This includes corporations, Act I of 1868, sec. 2, *supra*, p. 487.

² Compare the Contract Act, sec. 11, *supra*, p. 552. If the drawee of a bill of exchange be a minor or otherwise incapable to contract, the holder may at his option treat the instrument either as a bill or a promissory note.

³ See *In re Peruvian Railways Co.*, L. R. 2 Ch. Ap. 617. Rules as to bills etc. made by companies will be

found in Act VI of 1882, secs. 65, 72. As to the official liquidator's power to make bills, etc., *ibid.* sec. 184, cl. (f).

⁴ A person taking a bill signed by an agent 'by procuration' (*per proc.*) should require the production of the authority which the agent purports to exercise, *Attwood v. Munnings*, 7 B. & C. 278, 283, per Bayley J., and other cases in Byles, 41.

signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable¹.

29. A legal representative² of a deceased person, who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.

Liability
of legal
representative
signing.

30. The drawer of a bill of exchange or cheque is bound, in case of dishonour³ by the drawee or acceptor thereof, to compensate the holder⁴, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided⁵.

Liability
of drawer.

31. The drawee of a cheque⁶ having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default⁷.

Liability
of drawee
of cheque.

32. In the absence of a contract to the contrary⁸, the maker of a promissory note and the acceptor before maturity⁹ of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance

Liability
of maker
of note
acceptor
of bill.

¹ Cf. the Contract Act, s. 230. Unless he says plainly, 'I am the mere scribe,' he is liable, *Leadbitter v. Farrow*, 5 M. & S. 349, per Lord Ellenborough.

Mr. Chalmers (p. 40) remarks that neither the Contract Act, sec. 233, nor this Act excepts parties to negotiable instruments from the general rule that when an agent is personally liable a person dealing with him may hold either him or his principal or both of them liable. Where the agent signs for a limited company, see Act VI of 1882, sec. 72.

² heir, executor or administrator.

³ See *infra*, secs. 91-97.

⁴ As to the measure of damages, see *infra*, sec. 117.

⁵ And see as to the requirement of protest in the case of foreign bills, sec. 104. It may be argued from the

absence in secs. 30 and 31 of the words 'In the absence of a contract to the contrary' that the legislature did not mean the rules contained in those sections to be controlled by collateral agreements. Otherwise in the case of secs. 32 and 35.

⁶ i.e. a banker, sec. 6. Sec. 31 is confined to cheques. As a rule bankers decline to accept bills except in cases where they have specially agreed to do so. They cannot be expected to write off amounts from an ordinary account current to provide for acceptances.

⁷ As to the measure of damages see *Rolin v. Steward*, 14 C. B. 595; *Hopkinson v. Forster*, L. R. 19 Eq. 76.

⁸ i.e. some collateral contract controlling the ordinary operation of the note or bill.

⁹ Sec. 22.

respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

Only drawee can be acceptor except in need or for honour.

33. No person except the drawee¹ of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour², can bind himself by an acceptance³.

Acceptance by several drawees not partners.

34. Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself⁴, but none of them can accept it for another without his authority.

Liability of indorser.

35. In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding⁵ or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonour⁶, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided.

Every indorser after dishonour is liable as upon an instrument payable on demand.

Liability of prior parties to holder in due course.

36. Every prior party to a negotiable instrument is liable thereon to a holder in due course⁷ until the instrument is duly satisfied.

Maker, drawer and

37. The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in

¹ Of course he may accept by agent, *Lindus v. Bradwell*, 5 C. B. 583, where the defendant's wife bound him by her acceptance.

² Sec. 7, and chap. xi, *infra*.

³ Mr. Chalmers (p. 43) suggests that when a bill is addressed to no

one, and some person writes an acceptance on it, he is liable as the maker of a note.

⁴ See sec. 86.

⁵ Sec. 52.

⁶ As to the measure of damages, see sec. 117

⁷ Secs. 9 and 58.

the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be. acceptor principals.

38. As between the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary¹, also liable thereon as a principal debtor in respect of each subsequent party². Prior party a principal in respect of each subsequent party.

Illustration.

A draws a bill payable to his own order on *B*, who accepts. *A* afterwards indorses the bill to *C*, *C* to *D*, and *D* to *E*. As between *E* and *B*, *B* is the principal debtor, and *A*, *C* and *D* are his sureties. As between *E* and *A*, *A* is the principal debtor, and *C* and *D* are his sureties. As between *E* and *C*, *C* is the principal debtor and *D* is his surety.

39. When the holder of an accepted bill of exchange enters into any contract with the acceptor³ which, under section 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged⁴. Suretyship.

40. Where the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity. Discharge of indorser's liability.

Illustration.

A is the holder of a bill of exchange made payable to the order of *B*, which contains the following indorsements in blank :—

- First indorsement, '*B*.'
- Second indorsement, '*Peter Williams*.'
- Third indorsement, '*Wright & Co.*'
- Fourth indorsement, '*John Rozario*.'

This bill *A* puts in suit against John Rozario and strikes out,

¹ E. g. in the case of an accommodation bill. For there the drawer is the principal debtor and the acceptor is the surety, and if the acceptor pays the bill the drawer must indemnify him.

² See the Contract Act, *supra*, secs. 132-140.

³ The principal debtor, sec. 37.

⁴ *Muir v. Crawford*, L. R., Sc. & Div. Ap. 456.

without John Rozario's consent, the indorsements by Peter Williams and Wright & Co. A is not entitled to recover anything from John Rozario.

Acceptor bound, although indorsement forged.

41. An acceptor of a bill of exchange already indorsed¹ is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill².

Acceptance of bill drawn in fictitious name.

42. An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer³.

Negotiable instrument made &c. without consideration.

43. A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration⁴, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Exception I.—No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he have paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II.—No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the

¹ purporting to be indorsed by the payee, *Beeman v. Duck*, 11 M. & W. 251.

² See sec. 120, *infra*, and compare the Evidence Act, secs. 115, 117.

³ Compare the Evidence Act I of 1872, sec. 117, in the second volume of this work.

⁴ As to what is 'consideration,' see the Contract Act (*supra*, p. 546), sec. 2, cl. d, and 6 Mad. 351. A pro-

missory note payable *on demand*, given by A to B for interest due to B on a mortgage deed, with interest on such interest, is made without consideration, 7 Bom. H. C., O. C. J. 9. For before he made the note A was liable to pay the money on demand, and so he continued to be. The interest is accessory to the principal, and the promise to pay it is not a separate contract.

same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

44. When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

Explanation.—The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange or cheque stands in immediate relation with the payee, and the indorser with his indorsee. Other signers may by agreement stand in immediate relation with a holder ¹.

Illustration.

A draws a bill on *B* for Rs. 500 payable to the order of *A*. *B* accepts the bill, but subsequently dishonours it by non-payment. *A* sues *B* on the bill. *B* proves that it was accepted for value as to Rs. 400, and as an accommodation to the plaintiff as to the residue. *A* can only recover Rs. 400.

45. Where a part of the consideration for which a person signed a promissory note, bill of exchange or cheque, though not consisting of money, is ascertainable in money without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced ².

45 A. Where a bill of exchange has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving

¹ And the acceptor of a bill drawn and accepted for the accommodation of the payee stands in immediate relation with the payee.

² Mr. Chalmers supplies the following illustration:—*A* agrees to sell two

bales of cotton to *B*, and draws a bill on him for the agreed price, namely Rs. 1000. *B* accepts the bill and then *A* delivers only one bale. *A* sues *B* as acceptor of the bill. *A* can only recover Rs. 500.

Partial failure of consideration not consisting of money.

Holder's right to duplicate lost bill.

security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so¹.

¹ Act II of 1885, sec. 3.

CHAPTER IV.

OF NEGOTIATION.

46. The making, acceptance or indorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive ¹.

As between parties standing in immediate relation ², delivery to be effectual must be made by the party making, accepting or indorsing the instrument, or by a person authorized by him in that behalf.

As between such parties and any holder ³ of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

A promissory note, bill of exchange or cheque payable to order is negotiable by the holder ³ by indorsement and delivery thereof ⁴.

47. Subject to the provisions of section fifty-eight, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof. Negotiation by delivery.

Exception.—A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a

¹ i. e. transfer of a possession actual or constructive. 'Constructive possession' is what jurists call 'representative possession,' i. e. where the thing is in the custody of the owner's agent, clerk, or servant. Where there is authority express or implied to send a bill by post, the post office is deemed to be the agent of the person to whom the bill is sent, and therefore delivery is complete as soon as the letter containing the bill is posted, *Ex p. Cote*, 9 L. R., Ch. Ap. 27. But

where (as in France) the person posting a letter may get it back on complying with certain forms at any time before the letter has left the town where it is posted, property in the bill does not pass till the letter has left the office, *ibid*.

² Sec. 44.

³ See the first note on sec. 15.

⁴ See secs. 7, 14 and 15. The fourth and fifth clauses of sec. 46 were left in the Bill *per incuriam*. The matter is provided for in secs. 47, 48.

certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

Illustrations.

(a) *A*, the holder of a negotiable instrument payable to bearer, delivers it to *B*'s agent to keep for *B*. The instrument has been negotiated.

(b) *A*, the holder of a negotiable instrument payable to bearer, which is in the hands of *A*'s banker, who is at the time the banker of *B*, directs the banker to transfer the instrument to *B*'s credit in the banker's account with *B*. The banker does so, and accordingly now possesses the instrument as *B*'s agent. The instrument has been negotiated, and *B* has become the holder of it.

Negotiation by indorsement.

48. Subject to the provisions of section fifty-eight, a promissory note, bill of exchange or cheque payable to the order of a specified person, or to a specified person or order, is negotiable by the holder¹ by indorsement and delivery thereof.

Conversion of Indorsement in blank into indorsement in full.

49. The holder¹ of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full; and the holder¹ does not thereby incur the responsibility of an indorser.

Effect of indorsement.

50. The indorsement of a negotiable instrument followed by delivery² transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person³.

Illustrations.

B signs the following indorsements on different negotiable instruments payable to bearer:—

(a) 'Pay the contents to *C* only.'

(b) 'Pay *C* for my use.'

(c) 'Pay *C* or order for the account of *B*.'

¹ See sec. 8, and p. 678, note 8.

² As to conditional delivery see sec. 46.

³ As to conditional indorsements see sec. 52.

(d) 'The within must be credited to C.'

These indorsements exclude the right of further negotiation by C.

(e) 'Pay C.'

(f) 'Pay C value in account' with the Oriental Bank.'

(g) 'Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to the indorser and others.'

These indorsements do not exclude the right of further negotiation by C.

51. Every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section fifty, indorse and negotiate the same. Who may negotiate.

Explanation.—Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof; or enables a payee or indorsee to indorse or negotiate an instrument, unless he is holder thereof.

Illustration.

A bill is drawn payable to A or order. A indorses it to B, the indorser not containing the words 'or order' or any equivalent words. B may negotiate the instrument.

52. The indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. Indorser who excludes his own liability or makes it conditional.

Where an indorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.

Illustrations.

(a) The indorser of a negotiable instrument signs his name, adding the words—

'Without recourse.'

Upon this indorsement he incurs no liability.

(b) A is the payee and holder of a negotiable instrument. Ex-

¹ 'Value in account' means only value received in account. It in no way restricts the effect of the indorsement, *Buckley v. Jackson*, L. R., 3 Ex. 136, per Kelly C.B.

cluding personal liability by an indorsement 'without recourse,' he transfers the instrument to *B*, and *B* indorses it to *C*, who indorses it to *A*. *A* is not only reinstated in his former rights, but has the rights of an indorsee against *B* and *C*.

Holder deriving title from holder in due course.

53. A holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course.

Instrument indorsed in blank.

54. Subject to the provisions hereinafter contained as to crossed cheques¹, a negotiable instrument indorsed in blank is payable to the bearer thereof even although originally payable to order.

Indorsement in blank followed by indorsement in full.

55. If a negotiable instrument, after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person².

Indorsement for part of sum due.

56. No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance³.

Legal representative cannot by delivery only negotiate instrument indorsed by deceased.

57. The legal representative of a deceased person⁴ cannot negotiate by delivery only a promissory note, bill of exchange or cheque payable to order and indorsed by the deceased but not delivered⁵.

¹ Secs. 123-131.

² The following illustration is taken from Chalmers, p. 60: *C*, the payee of a bill, indorses it in blank and delivers it to *D*. Then *D* specially indorses it to *E* or order. *E* without indorsement transfers the bill to *F*. Then *F* as the bearer is entitled to receive payment or to sue the drawer, the acceptor, or *C*, who indorsed in blank; but he cannot sue *D* or *E*. (*Smith v. Clarke*, Peake 295, and cf. *Walker v. Macdonald*, 2 Exch. 527.)

³ The following illustrations are suggested by Mr. Chalmers:—

The bill is for Rs. 100.

(a) 'Pay *C* or order Rs. 50.'

(b) 'Pay *C* Rs. 40 and the remainder to *D*.'

(c) 'Pay *C* or order Rs. 50, being the unpaid residue of this bill.'

Indorsements (a) and (b) are invalid for purpose of negotiation. Indorsement (c) is valid.

⁴ His heir, executor, or administrator is not his agent.

⁵ He must himself re-indorse and deliver.

58. When a negotiable instrument has been lost, or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course ¹.

Instrument obtained by unlawful means or for unlawful consideration.

59. The holder of a negotiable instrument ², who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor :

Instrument acquired after dishonour or when over-due.

Provided that any person who, in good faith ³ and for consideration, becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party ⁴.

Accommodation note or bill.

Illustration.

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds, but indorsed the bill to A. A's title is subject to the same objection as the drawer's title.

60. A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction ⁵.

Instrument negotiable till payment or satisfaction.

¹ Sec. 9.

² This includes cheques.

³ See *supra*, p. 103.

⁴ i. e. where an accommodation bill is negotiated after maturity a

holder for consideration may recover thereon, Chalmers, p. 66.

⁵ This section is of course subject to the provisions of sec. 82-90.

CHAPTER V.

OF PRESENTMENT.

Present-
ment for
acceptance.

61. A bill of exchange payable after sight¹ must, if no time or place is specified therein for presentment, be presented to the drawee² thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time³ after it is drawn, and in business hours⁴ on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured⁵.

If the bill is directed to the drawee at a particular place, it must be presented at that place; and if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

Where authorised by agreement or usage, a presentment through the Post Office by means of a registered letter is sufficient⁶.

Present-
ment of
promissory
note for
sight.

62. A promissory note, payable at a certain period after sight⁷, must be presented to the maker thereof for sight (if he can after reasonable search be found) by a person entitled to demand payment, within a reasonable time⁸ after it is made and in business hours on a business day. In default of

¹ Sec. 21. In the case of other bills presentment is optional, unless there be a contract to the contrary.

² or his duly authorised agent, sec. 75. As to the drawee in case of need, see sec. 115.

³ Sec. 105, and see 11 Cal. 344, 348.

⁴ In the case of a non-trader this would be construed to mean 'at a reasonable hour,' *Chalmers*, p. 68. So in cases under sec. 65.

⁵ See secs. 76, 91, 92.

⁶ Act II of 1885, sec. 4.

⁷ Sec. 21.

⁸ Sec. 105.

such presentment, no party thereto is liable thereon to the person making such default.

63. The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee twenty-four hours (exclusive of public holidays) to consider whether he will accept it¹. Drawee's time for deliberation.

64. Promissory notes, bills of exchange and cheques must be presented for payment² to the maker, acceptor or drawee thereof respectively³, by or on behalf of the holder as herein-after provided. In default of such presentment, the other parties thereto are not liable thereon to such holder. Presentment for payment.

Where authorised by agreement or usage a presentment through the Post Office by means of a registered letter is sufficient⁴.

Exception.—Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

65. Presentment for payment must be made during the usual hours of business⁵, and, if at a banker's, within banking hours⁶. Hours for presentment.

66. A promissory note or bill of exchange, made payable at a specified period after date or sight thereof⁷, must be presented for payment at maturity⁸. Presentment for payment at maturity.

67. A promissory note payable by instalments must be presented for payment on the third day after the date fixed for payment of each instalment; and non-payment on such presentment has the same effect⁹ as non-payment of a note at maturity. Presentment for payment of note payable by instalments.

¹ When the twenty-four hours expire the holder should demand the redelivery of the bill, and if the drawee does not return it duly accepted, the holder must treat it as dishonoured and give notice of dishonour (sec. 83), or cause it to be protested.

² As to the time, see secs. 22, 23, 64, 66; as to the place, secs. 70, 71, 72. The document itself must be presented, *Griffin v. Weatherby*, L. R. 3 Q. B. 761.

³ or his agent, representative of

assignee, sec. 75.

⁴ Act II of 1885, sec. 4.

⁵ i. e. from 10 a.m. to 6 p.m., except on Saturdays, when the hours are generally from 10 a.m. to 3 p.m.

⁶ i. e. from 10 a.m. to 3 p.m., except on Saturdays, when the hours are from 10 a.m. to 1 p.m.

⁷ or on the lapse of a certain period after the occurrence of a specified event, sec. 5, cl. 2

⁸ Sec. 22.

⁹ as to the instalment due?

68. A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place.

Presentment where instrument payable at specified place and not elsewhere.

Instrument payable at specified place.

69. A promissory note or bill of exchange made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer¹ thereof, be presented for payment at that place.

Presentment where no exclusive place specified.

70. A promissory note or bill of exchange, not made payable as mentioned in sections sixty-eight and sixty-nine, must be presented for payment at the place of business (if any), or² at the usual residence, of the maker, drawee or acceptor thereof, as the case may be.

Presentment when maker &c. has no known place of business or residence.

71. If the maker, drawee or acceptor of a negotiable instrument has no known place of business or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.

Presentment for cheque to charge drawer.

72. A cheque³ must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer⁴.

Presentment of cheque to charge any other.

73. A cheque must, in order to charge any person except the drawer, be presented within a reasonable time⁵ after delivery thereof by such person.

Presentment of instrument payable on demand.

74. Subject to the provisions of section thirty-one, a negotiable instrument payable on demand must be presented for payment within a reasonable time⁵ after it is received by the holder⁶.

Presentment to agent, representative or assignee.

75. Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be, or, where the drawee, maker or acceptor

¹ or indorser, who is a surety for the maker or drawer.

² in the case of a non-trader.

³ Sec. 6.

⁵ Sec. 105.

⁶ But see sec. 64.

⁴ But see sec. 84.

has died, to his legal representative, or, where he has been declared an insolvent, to his assignee¹.

76. No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases:—

When presentment unnecessary.

(a) if the maker, drawee or acceptor intentionally prevents² the presentment of the instrument, or,

if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or,

if the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours, or,

if the instrument not being payable at any specified place, he cannot after due³ search be found;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented—

he makes a part payment on account of the amount due on the instrument,

or promises to pay the amount due thereon in whole or in part,

or otherwise waives his right to take advantage of any default in presentment for payment;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment⁴.

77. When a bill of exchange, accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss⁵.

Liability of banker for negligently dealing with bill presented for payment.

¹ As to presentment by an agent, see secs. 61, 64.

² But where the acceptor merely tells the holder he will not pay the bill, presentment is necessary, *Baker v. Birch*, 3 Camp. 107.

³ = 'reasonable,' secs. 61, 62.

⁴ That due presentment is also excused by *vis maior* see the Contract Act, sec. 56, *supra*, p. 579.

⁵ *Warwick v. Rogers*, 5 M. & Gr. 340.

CHAPTER VI.

OF PAYMENT AND INTEREST.

To whom
payment
should be
made.

78. Subject to the provisions of section eighty-two, clause (c), payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder¹ of the instrument.

Interest
when rate
specified.

79. When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs.

Interest
when
no rate
specified.

80. When no rate of interest is specified in the instrument, interest on the amount due thereon shall, except in cases provided for by the Code of Civil Procedure, section 532, be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged², until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

Explanation.—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour³.

¹ Sec. 8. See the first note to sec. 15.

² i.e. from the date of the dishonour of the instrument. In England where a note is expressed to be payable with interest, and no rate is specified, interest at 5 per cent. would

run from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case, Byles 445.

³ *Walker v. Barnes*, 5 Taunt. 240: Byles, 446.

81. Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange or cheque is before payment entitled to have it shown, and is on payment entitled to have it delivered up, to him¹, or, if the instrument is lost² or cannot be produced, to be indemnified against any further claim thereon against him.

¹ *Hansard v. Robinson*, 7 B. & C. 90.

² See sec. 45 A *supra*, as to the holder's right to a duplicate of a *bill*

lost before it is overdue. But the Act provides no machinery whereby the owner of a lost *note* can get a duplicate from the maker.

CHAPTER VII.

OF DISCHARGE FROM LIABILITY ON NOTES, BILLS AND CHEQUES.

Discharge
from li-
ability—
by can-
cellation ;

82. The maker, acceptor or indorser respectively of a negotiable instrument is discharged from liability thereon—

(a) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder ;

by release ; (b) to a holder thereof who otherwise discharges¹ such maker, acceptor or indorser, and to all parties deriving title under such holder after notice of such discharge ;

by pay-
ment. (c) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor or indorser makes payment in due course of the amount due thereon.

Discharge
by allowing
drawee
more than
twenty-
four hours
to accept.

83. If the holder of a bill of exchange allows the drawee more than twenty-four hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

When
cheque not
duly pre-
sented and
drawer
damaged
thereby.
Cheque
payable
to order.

84. When the holder of a cheque fails to present it for payment within a reasonable time, and the drawer thereof sustains loss or damage from such failure, he is discharged from liability to the holder.

85. Where a cheque payable to order purports to be indorsed by or on behalf of the payee², the drawee is discharged by payment in due course.

Parties not
consenting

86. If the holder of a bill of exchange acquiesces in a

¹ whether with or without consideration ?

² Sec. 7.

qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.

Explanation.—An acceptance is qualified—

(a) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated ;

(b) where it undertakes the payment of part only of the sum ordered to be paid¹ ;

(c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere ; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere² ;

(d) where it undertakes the payment at a time other than that at which under the order it would be legally due.

87. Any material alteration³ of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties⁴ ;

and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

¹ That the legal relation between drawee and payee is not altered by a partial acceptance, the contract being in its nature indivisible, see 3 Bom. 182.

² 1 & 2 Geo. IV, c. 78.

³ 12 Cal. 313. Under 45 & 46 Vic. c. 64, the following alterations are material :—any alteration of the date, the sum payable, the time of payment, the place of payment, and when a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

The following have been held to be immaterial :—a bill payable to *C* or bearer is converted into a bill payable

to *C* or order ; the words 'on demand' are added to a note in which no time of payment is expressed, Chalmers, 89.

⁴ 6 Bom. 371. The rule holds even though the alteration be made by a stranger. The holder of a bill having it in his custody is responsible for it, and for its preservation in its integrity. Byles, 335 ; *Davidson v. Cooper*, 11 M. & W. 778, affirmed in error, 13 M. & W. 343 ; *Bank of Hindostan v. Smith*, 36 L. J., C. P. 241.

As to the burden of proof where a bill appears to have been altered, see the Evidence Act, sec. 102, and 3 Mad. H. C. 247.

discharged
by qualified
or
limited
acceptance.

Effect of
material
alteration.

Alteration
by indorsee.

The provisions of this section are subject to those of sections twenty, forty-nine, eighty-six and one hundred and twenty-five.

Acceptor or indorser bound notwithstanding previous alteration. Payment of instrument on which alteration is not apparent.

88. An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument.

89. Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered,

or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated,

payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered, or the cheque crossed ¹.

Extinguishment of rights of action on bill in acceptor's hands.

90. If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right ², all rights of action thereon are extinguished.

¹ This extends to alterations of notes and bills the protection given to bankers, in the case of the alteration of the crossing on a cheque, by

39 & 40 Vic. c. 81, sec. 11.

² not, for instance, as executor. See, in England, *Freakley v. Fox*, 9 B. & C. 130.

CHAPTER VIII.

OF NOTICE OF DISHONOUR.

91. A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted. Dishonour by non-acceptance.

Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured.

92. A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. Dishonour by non-payment.

93. When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon. By and to whom notice should be given.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note, or the drawee or acceptor of the dishonoured bill of exchange or cheque.

94. Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee¹; may be oral or Made in which notice may be given.

¹ The case where he has become a lunatic is omitted.

written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment¹, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time² after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and mis-carries, such miscarriage does not render the notice invalid.

Party
receiving
must
transmit
notice of
dishonour.

95. Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time³, unless such party otherwise receives due notice as provided by section ninety-three⁴.

Agent
for pre-
sentment.

96. When the instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour.

When
party to
whom
notice
given is
dead.

97. When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death⁵, the notice is sufficient.

When
notice of
dishonour
is unneces-
sary.

98. No notice of dishonour is necessary—

- (a) when it is dispensed with by the party entitled thereto;
- (b) in order to charge the drawer, when he has counter-manded payment;
- (c) when the party charged could not suffer damage for want of notice⁶;
- (d) when the party entitled to notice cannot after due

¹ *Hedger v. Stevenson*, 2 M. & W. 799.

² This must be determined according to the circumstances of the case, 6 All. 78, where this rule was applied to a hundi, no local usage to the contrary being proved.

³ See secs. 106, 107.

⁴ Ordinarily notice of dishonour by

non-acceptance of a bill drawn in India and payable in England should be posted by the first mail which leaves England after the dishonour, 3 N. W. P. 99.

⁵ where the death is known, see sec. 94.

⁶ 6 All. 78.

search¹ be found ; or the party bound to give notice is, for any other reason, unable without any fault of his own to give it ;

(e) to charge the drawers, when the acceptor is also a drawer ;

(f) in the case of a promissory note which is not negotiable ;

(g) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

¹ i. e. such search and enquiry as notice in the terms mentioned in sec. 106, Shaw, p. 156. would enable the holder to give

CHAPTER IX.

OF NOTING AND PROTEST.

Noting. **99.** When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon each.

Such note must be made within a reasonable time¹ after dishonour, and must specify the date of dishonour, the reason, if any, assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges.

Protest. **100.** When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment², the holder³ may⁴, within a reasonable time, cause such dishonour to be noted and certified⁵ by a notary public. Such certificate is called a protest.

Protest for better security. When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security.

Contents of protest. **101.** A protest under section one hundred must contain—
(a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon ;

¹ Sec. 105.

² There is no provision for protesting a lost bill or note.

³ Sec. 8.

⁴ As to when an inland bill *must* be protested, see chap. xi *infra*.

⁵ In *Bombay City Bank v. Moonjee Hurridoss*, Bourke, Rep. 274, Phear J. seems to have held that the mere noting, even if it disclose the notary's name, is not evidence of presentment or dishonour.

(b) the name of the person for whom and against whom the instrument has been protested;

(c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found;

(d) when the note or bill has been dishonoured, the place and time of dishonour, and, when better security has been refused, the place and time of refusal;

(e) the subscription¹ of the notary public making the protest;

(f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which, such acceptance or payment was offered and effected.

A notary public may make the demand mentioned in clause (c) of this section either in person or by his clerk or, where authorized by agreement or usage, by registered letter².

102. When a promissory note or bill of exchange is required by law to be protested, notice of such protest³ must be given instead of notice of dishonour, in the same manner and subject to the same conditions; but the notice may be given by the notary public who makes the protest.

103. All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance, may, without further presentment to the drawee, be protested for non-payment, in the place specified for payment, unless paid before or at maturity.

104. Foreign bills of exchange⁴ must be protested for dishonour when such protest is required by the law of the place where they are drawn⁵.

¹ not the seal.

² Act II of 1885, sec. 5.

³ It is not necessary to send a copy of the protest.

⁴ Sec. 12.

⁵ There is no express requirement that foreign notes (*Bonar v. Mitchell*, 5 Exch. 415) or cheques must be protested; but see sec. 102.

When
noting is
equivalent
to protest.

104 A. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting¹.

¹ Act II of 1885, sec. 6.

CHAPTER X.

OF REASONABLE TIME.

105. In determining what is a reasonable time for presentment for acceptance or payment¹, for giving notice of dishonour and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments²; and, in calculating such time, public holidays³ shall be excluded⁴. Reasonable time.

106. If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour⁵. Reasonable time of giving notice of dishonour.

If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

107. A party receiving notice of dishonour, who seeks to enforce his right against a prior party, transmits the notice within a reasonable time if he transmits it within the same time after its receipt as he would have had to give notice if he had been the holder. Reasonable time for transmitting such notice.

¹ or for sight, sec. 62.

² See 7 Ben. 431. Notice of dishonour of a bill drawn in India and payable in England should be posted by the first mail which leaves

England after the dishonour of the bill, 3 N. W. P. 99.

³ Sec. 25.

⁴ See sec. 98.

⁵ See sec. 98, cl. (d).

CHAPTER XI.

OF ACCEPTANCE AND PAYMENT FOR HONOUR AND REFERENCE IN CASE OF NEED.

Accept-
ance for
honour.

108. When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon¹ may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto².

How ac-
ceptance
for honour
must be
made.

109. A person desiring to accept for honour must, by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour³.

Accept-
ance not
specifying
for whose
honour it
is made.

110. Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer.

Liability of
acceptor
for honour.

111. An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not; and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

But an acceptor for honour is not liable to the holder of the bill unless it is presented, or (in case the address given by such acceptor on the bill is a place other than the place where the

¹ Secs. 7 and 33.

² The rest of this section was re-
pealed by Act II of 1885, sec. 7.

³ As amended by Act II of 1885,
sec. 8.

bill is made payable) forwarded for presentment, not later than the day next after the day of its maturity.

112. An acceptor for honour cannot be charged unless the bill has at its maturity been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour ^{When acceptor for honour may be charged.} ^{1.}

113. When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay the same ^{Payment for honour.} ^{2,} provided that the person so paying or his agent in that behalf ³ has previously declared before a notary public the party for whose honour he pays, and that such declaration has been recorded by such notary public.

114. Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment. ^{Right of payer for honour.}

115. Where a drawee in case of need ⁴ is named in a bill of exchange, or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee ^{Drawee in case of need.} ^{5.}

116. A drawee in case of need ⁴ may accept and pay the bill of exchange without previous protest. ^{Acceptance and payment without protest.}

¹ *Hoare v. Cazenove*, 16 East, 391.

² and the holder must receive the payment.

³ The words 'or his agent in that behalf' were inserted by Act II of 1885, sec. 9.

⁴ Sec. 7.

⁵ The bill must therefore be, with reasonable diligence, presented to, or forwarded for presentment to, the drawee in case of need.

CHAPTER XII.

OF COMPENSATION.

Rules as to
compensation.

117. The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, shall (except in cases provided for by the Code of Civil Procedure, section 532) be determined by the following rules:—

(a) the holder is entitled to the amount due upon the instrument¹, together with the expenses properly incurred in presenting, noting and protesting it;

(b) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places;

(c) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment;

(d) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places;

(e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him². Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

¹ including interest as provided by secs. 79, 80.

² These are (besides the expenses of protest) postage, customary commis-

sion and brokerage, and, when a re-draft is drawn, the price of the stamp, Chalmers, 108.

CHAPTER XIII.

SPECIAL RULES OF EVIDENCE.

118. Until the contrary is proved, the following presumptions shall be made :—

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration ¹.

(b) that every negotiable instrument bearing a date was made or drawn on such date ²;

(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) that every transfer of a negotiable instrument was made before its maturity;

(e) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him ³.

119. In a suit upon an instrument which has been dis-

¹ That a promissory note which has for its consideration a debt due on a wagering contract is not binding in the hands of the original payee, see 8 Bom. H. C., A. C. J. 131.

² The Evidence Act, sec. 114, ill.

(c), which says that the Court *may* presume that a bill accepted or indorsed was accepted or indorsed for good consideration, does not quite suffice for this presumption.

³ 5 Cal. 654.

Presump-
tions as to
negotiable
instru-
ments
of consid-
eration;

as to date;

as to time
of accept-
ance;

as to time
of transfer;

as to order
of indorse-
ments;

as to
stamp;

that holder
is a holder
in due
course.

Presump-
tion on

proof of protest. honoured, the Court shall, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

Estoppel against denying original validity of instrument. **120.** No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer¹ shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

Estoppel against denying capacity of payee to indorse. **121.** No maker of a promissory note and no acceptor of a bill of exchange payable to, or to the order of, a specified person shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

Estoppel against denying signature or capacity of prior party. **122.** No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.

¹ An ordinary acceptor is not mentioned because the Evidence Act, sec. 117, provides that he may deny that

the bill was really drawn by the person by whom it purports to have been drawn.

CHAPTER XIV.

OF CROSSED CHEQUES.

123. Where a cheque bears across its face an addition of the words 'and company' or any abbreviation thereof between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally¹.

124. Where a cheque bears across its face an addition of the name of a banker², either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

125. Where a cheque is uncrossed, the holder³ may cross it generally or specially.

Where a cheque is crossed generally, the holder³ may cross it specially.

Where a cheque is crossed generally or specially, the holder³ may add the words 'not negotiable.'

Where a cheque is crossed specially, the banker² to whom it is crossed may again cross it specially to another banker, his agent, for collection.

126. Where a cheque is crossed generally, the banker² on whom it is drawn shall not pay it otherwise than to a banker.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection.

¹ 39 & 40 Vic. c. 81, sec. 4. As to the effect of crossing a cheque see *Smith v. Union Bank*, 1 Q. B. D. 35, per Lord Cairns C. 1° it imposes caution on the banker; 2° it alters the mandate, and the customer the drawer may object to being charged with the cheque if paid contrary to

his altered direction; 3° if in addition to the cheque being crossed, the payer's signature was forged, he would retain his property and could recover it from the banker.

² Sec. 3.

³ Sec. 8.

Cheque crossed generally.

Crossing after issue.

Cheque crossed specially.

Payment of cheque crossed generally.

Payment of cheque crossed specially.

Payment
of cheque
crossed
specially
more than
once.

127. Where a cheque is crossed specially to more than one banker¹, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof².

Payment
in due
course of
crossed
cheque.

128. Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

Payment
of crossed
cheque out
of due
course.

129. Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid³.

Cheque
bearing
'not nego-
tiable.'

130. A person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

Non-li-
ability of
banker
receiving
payment
of cheque.

131. A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment⁴.

¹ Sec. 3.

² If, nevertheless, he pays, he pays at his peril, and will be liable to the true owner of the cheque if payment be made to the wrong person, *Chalmers*, 116.

³ *Smith v. Union Bank of London*, L. R., 10 Q. B. 291: *affd.* 1 Q. B. D. 31.

⁴ *Mathiessen v. London & County Bank*, 5 C. P. D. 7.

CHAPTER XV.

OF BILLS IN SETS.

132. Bills of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All the parts together make a set¹; but the whole set constitutes only one bill, and is extinguished when one of the parts, if a separate bill, would be extinguished. Set of bills.

Exception.—When a person accepts or indorses different parts of the bill in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill.

133. As between holders in due course of different parts of the same set, he who first acquired title to his part is entitled to the other parts and the money represented by the bill². Holder of first acquired part entitled to all.

¹ As to accepting a bill drawn in parts, see sec. 7, para. 3. The Stamp Act does not contemplate more parts

than three.

² *Holdsworth v. Hunter*, 10 B. & C. 449.

CHAPTER XVI.

OF INTERNATIONAL LAW.

Law governing liability of maker, acceptor or indorser of foreign instrument.

134. In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser¹ by the law of the place where the instrument is made payable.

Illustration.

A bill of exchange was drawn by *A* in California, where the rate of interest is 25 per cent., and accepted by *B*, payable in Washington, where the rate of interest is 6 per cent. The bill is endorsed in British India, and is dishonoured. An action on the bill is brought against *B* in British India. He is liable to pay interest at the rate of 6 per cent. only; but if *A* is charged as drawer, *A* is liable to pay interest at the rate of 25 per cent.

Law of place of payment governs dishonour.

135. Where a promissory note, bill of exchange or cheque is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient².

Illustration.

A bill of exchange drawn and indorsed in British India, but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in

¹ *Horne v. Rouquette*, L. R., 3 Q. B. D. 514. In England the indorsee is regarded as in the nature of a new drawer and his liabilities seem regulated by the law of the place where he indorsed the instrument, *Chalmers*, 121, citing *Allen v. Kemble*, 6 Moo. P. C. 321, and so the Commissioners framed their draft. The

Select Committee, however, thought that as the indorser is a surety for the acceptor his liability is measured by that of his principal, is, in other words, regulated by the *lex loci* of performance.

² *Gibbs v. Fremont*, 9 Exch. 31, and *Byles*, 389.

accordance with the law of France, though not in accordance with the rules herein contained in respect of bills which are not foreign. The notice is sufficient.

136. If a negotiable instrument is made, drawn, accepted or indorsed out of British India, but in accordance with the law of British India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon in British India ¹.

Instrument made &c. out of British India, but in accordance with its law.

137. The law of any foreign country regarding promissory notes, bills of exchange and cheques shall be presumed to be the same as that of British India, unless and until the contrary is proved ².

Presumption as to foreign law.

¹ Mr. Chalmers says (p. 123) that this section seems to have been taken in part from sec. 85 of the German General Exchange Law.

² This section should be transferred to the Evidence Act. As to foreign stamp law, the Indian, like the English, Courts do not re-

gard the revenue-laws of another country, Byles, 386, 390, except, perhaps, where a bill issued abroad is absolutely void because it is not stamped in accordance with the law of the place of issue, Story, *Conflict of Laws*, 2nd ed. p. 341; *Bristow v. Secqueville*, 5 Exch. 275.

CHAPTER XVII.¹

NOTARIES PUBLIC.

Power to
appoint
notaries
public.

138. The Governor General of India in Council may, from time to time, by notification in the official Gazette, appoint any person, by name or by virtue of his office, to be a notary public under this Act, and to exercise his function as such within any local area, and may, by like notification, remove from office any person appointed notary public under this Act.

Power to
make rules
for notaries
public.

139. The Governor General in Council may, from time to time, by notification in the official Gazette, make rules consistent with this Act for the guidance and control of notaries public appointed under this Act, and may, by such rules, (among other matters) fix the fees payable to such notaries.

¹ Added by Act II of 1885, sec. 10.

SCHEDULE.

(a)—Statutes.

Year and chapter.	TITLE.	Extent of repeal.
9 Wm. III, c. 17.	An Act for the better payment of Inland Bills of Exchange.	The whole.
3 & 4 Anne, c. 8.	An Act for giving like remedy upon promissory notes as is now used upon Bills of Exchange, and for the better payment of Inland Bills of Exchange.	The whole.

(b)—Acts of the Governor General in Council.

Number and year.	TITLE.	Extent of repeal.
VI of 1840 .	An Act for the amendment of the law concerning the negotiation of Bills of Exchange.	The whole.
V of 1866 .	An Act to amend in certain respects the Commercial Law of British India.	Sections 11, 12, and 13.
XV of 1874 .	The Laws Local Extent Act, 1874.	The first schedule, so far as relates to Act VI of 1840 and Act V of 1866, sections 11, 12 and 13.

TABLE SHOWING THE CORRESPONDING SECTIONS
OF ACT XXVI OF 1881 AND 45 & 46 VIC. c. 61¹.

XXVI OF 1881.	45 & 46 VIC. c. 61.	XXVI OF 1881.	45 & 46 VIC. c. 61.
1	1.	40	see sec. 63 (2).
2	96.	41	see sec. 54 (b), (c).
3	2.	42	—
4	83 (1), 89.	43	28 (1), (2).
5	3 (1), 3 (3), 6 (1), 7 (1), 9 (1), (a), (c), (d).	44	—
6	73.	45	—
7	15, 17 (1), 65 (1).	46, par. 1	21 (1).
8	2.	" " 2	21 (2), (a).
9	29 (1), (a), (b).	" " 3	21 (2), (b).
10	59 (1).	" " 4	31 (2).
11	4 (1), 83 (4).	" " 5	32 (3).
12	4 (1).	47	31 (2).
13	8 (2).	48	31 (3).
14	31 (1) : see also sec. 2 (issue).	49	34 (4).
15	32 (1), 56.	50	35 (1).
16	34 (1), (2).	51	32 (3), 36 (1).
17	5 (2).	52	see sec. 33.
18	9 (2).	53	29 (3).
19	10 (1), (b).	54	34 (1).
20	20.	55	35 (2), (3).
21	10 (1), (a), 11 (1).	56	32 (2).
22, par. 2	14 (1).	57	—
23	14 (2), (3).	58	38 (3).
24	14 (2), (3).	59	36 (2), (5).
25	14 (1), (a), (b).	60	36 (1).
" expl.	92.	61, par. 1	39 (1).
26, par. 1	22 (1).	" " 2	41 (2), (b).
" " 2	22 (2).	" " 3	39 (2).
" " 3	22 (1).	62	39 (2), 89 (1).
27	—	63	see sec. 42.
28	25, 26 (1).	64	87 (1).
29	26 (1), 35 (5).	65	45 (3).
30	55 (1).	66	45 (1).
31	—	67	—
32	54 (1), 88 (1).	68	52 (1), (2).
33	—	69	45 (4), (a).
34	6 (2).	70	45 (4), (c).
35	55 (2).	71	45 (4), (d).
" par. 2	10 (2).	72	74 (1).
36	—	73	—
37	89 (2).	74	45 (2).
38	—	75	41 (1) (a), (c), (d), 45 (3), (7).
39	—	76	43 (b).
		" (a)	45 (5), 41 (2), (b).

¹ This Table is taken from Mr. P. D. Shaw's edition of the Negotiable Instruments Act, Madras 1882, pp. xviii, xix.

TABLES OF CORRESPONDING SECTIONS.

723

XXVI OF 1881. 45 & 46 VIC. C. 61.

76 (c) . . .	41 (2), (c).
„ (d) . . .	46 (2), (c).
77 . . .	—
78 . . .	59 (1).
79 . . .	9 (3).
80 . . .	—
81 . . .	52 (4).
82 . . .	—
„ (a) . . .	63 (1), (2).
„ (b) . . .	62 (1), (2).
83 . . .	42.
84 . . .	74 (1).
85 . . .	60.
86 . . .	44 (1), (2).
„ (a) . . .	19 (2), (a).
„ (b) . . .	19 (2), (b).
„ (c) . . .	19 (2), (c).
„ (d) . . .	19 (2), (d).
87 . . .	64 (1), (2).
88 . . .	64 (1).
89, pars. 1, 3	64 (1), proviso.
„ „ 2, 3	79, proviso.
90 . . .	61.
91 . . .	43 (1), (a).
92 . . .	47 (1).
93 . . .	48, 49 (1).
„ (2) . . .	52 (3).
94 . . .	49 (8), (9), (10), (5), (12).
„ (1) . . .	49 (15).
95 . . .	49 (14).
96 . . .	49 (13).
97 . . .	49 (9).
98 (a) . . .	50 (2), (b).
„ (b) . . .	50 (2), (c).
„ (c) . . .	50 (2), (c).
„ (d) . . .	50 (1).
„ (e) . . .	50 (2) (c).
„ (f) . . .	—
„ (g) . . .	see 46 (e).
99 . . .	51 (1).
100, par. 1	51 (2).
„ „ 2	51 (5).
101 (a), (d)	51 (7).
„ (b) . . .	51 (7), (a).
„ (c) . . .	51 (7), (b).

XXVI OF 1881. 45 & 46 VIC. C. 61.

102 . . .	—
103 . . .	51 (6), (b).
104 . . .	51 (2).
105 . . .	41 (2), 45 (2), 74 (2), 86 (2).
106, par. 1	49 (12), (b).
„ „ 2	49 (12), (a).
107 . . .	49 (14).
108, par. 1	61 (1).
109 . . .	65 (3), (a), (b).
110 . . .	65 (4).
111, par. 1	66 (1), (2).
„ „ 2	67 (2).
112 . . .	67 (1).
113 . . .	68 (1), (3), (4).
114 . . .	68 (5).
117 . . .	57.
118 (a) . . .	30 (1).
„ (b) . . .	13 (1).
„ (c) . . .	—
„ (d) . . .	36 (4).
„ (e) . . .	32 (5).
„ (f) . . .	—
„ (g) . . .	21 (2), (b), 21 (3), 30 (1), (2).
119 . . .	—
120 . . .	55 (1), (b): see also 54 (2), (a), (b).
121 . . .	54 (2), (c), 88 (2).
122 . . .	55 (2), (b), (c).
123 . . .	76 (1).
124 . . .	76 (2).
125, pars. 2, 3, 4	77 (2), (3), (4), (5).
126 . . .	—
127 . . .	79 (1).
128 . . .	80.
129 . . .	79 (2).
130 . . .	81.
131 . . .	82.
132, par. 1	71 (1).
„ „ 2	71 (2).
133 . . .	71 (3).
134 . . .	72 (1), (2).
135 . . .	72 (3).
136 . . .	72 (1), (b).
137 . . .	—

TABLE SHOWING THE CORRESPONDING SECTIONS
OF 45 & 46 VIC. c. 61 AND ACT XXVI OF 1881.

45 & 46 VIC. c. 61. XXVI OF 1881.

1	. . . . .	1.
2	. . . . .	3, 8, 14.
3	(1), (3)	5.
4	(1)	11, 12.
5	(2)	17.
6	(1)	5.
"	(2)	34.
7	(1)	5.
8	(1), (2)	13.
9	(1), (a), (c), (d)	5.
"	(2)	18.
"	(3)	79.
10	(1), (a)	21.
"	(b)	19.
"	(2)	35, par. 2.
11	(1)	21.
12	. . . . .	—
13	. . . . .	118 (b).
14	(1)	22, par. 2, 25.
"	(2), (3)	23, 24.
15	. . . . .	7.
16	. . . . .	—
17	(1)	7.
18	. . . . .	—
19	. . . . .	86.
20	. . . . .	20.
21	(1), (2), (a), (b)	46, 118 (2).
22	. . . . .	26.
23	. . . . .	—
24	. . . . .	—
25	. . . . .	28.
26	(1)	28, 29.
27	. . . . .	—
28	(1), (2)	43.
29	(1), (a), (b)	9.
"	(3)	53.
30	. . . . .	118 (a), (g).
31	(1)	14.
"	(2)	46, par. 4, 47.
"	(3)	48.
32	(1)	15.
"	(2)	56.
"	(3)	46, par. 5, 51.
"	(5)	118 (e).
33	. . . . .	52.
34	(1), (2)	16, 54.
"	(4)	49.

45 & 46 VIC. c. 61. XXVI OF 1881

35	(1)	50.
"	(2), (3)	55.
"	(5)	29.
36	(1)	51, 60.
"	(2), (5)	59.
"	(4)	118 (d).
37	. . . . .	—
38	. . . . .	—
"	(3)	58.
39	(1)	61, par. 1.
"	(2)	61, par. 3, 62.
40	. . . . .	—
41	(1)	75.
"	(2)	105.
"	(2), (b)	61, par. 2, 76 (a).
"	(2), (c)	76 (e).
"	(2), (d)	76 (a).
42	. . . . .	63, 83.
43	(a)	91.
"	(b)	76.
44	(1), (2)	86.
45	(1)	66.
"	(2)	74, 105.
"	(3)	65, 75.
"	(4)	69, 70, 71.
"	(5)	76 (a).
46	(2), (c)	76 (d).
"	(e)	98 (g).
47	(1)	92.
48	. . . . .	93.
49	. . . . .	93, 94, 95, 96, 97, 106, 107.
50	. . . . .	98.
51	. . . . .	99, 100, 101, 103, 104.
52	(1), (2)	68.
"	(3)	93 (2).
"	(4)	81.
53	. . . . .	—
54	(1)	32, 120, 121.
"	(b), (c)	41.
55	(1)	30, 120, 122.
"	(2)	35.
56	. . . . .	15.
57	. . . . .	117.
58	. . . . .	—
59	(1)	10, 78.
60	. . . . .	85.
61	. . . . .	90.

45 & 46 VIC. c. 61. XXVI OF 1881.	45 & 46 VIC. c. 61. XXVI OF 1881.
62 (1), (2) . . . 82 (b).	82 131.
63 40, 82 (a).	83 (1) 4.
64 87, 88, 89.	„ (4) 11.
65 7, 108, 109, 110.	84 —
66 111 (1).	85 —
67 111 (2), 112.	86 (2) 105.
68 113, 114.	87 (1) 64.
69 —	88 (1) 32, 121.
70 —	89 4, 62.
71 132, 133.	„ (2) 37.
72 134, 135, 136.	90 —
73 6.	91 —
74 (1) 72, 84.	92 25, expl.
„ (2) 105.	93 —
75 —	94 —
76 123, 124.	95 —
77 125.	96 2.
78 —	97 —
79, prov. 127, 129, 89, par. 2, 3.	98 —
80 128.	99 —
81 130.	100 —

A table of fees to be charged by persons appointed by the Governor General in Council under sec. 3 of Act XXVI of 1881 to perform the functions of a notary public, and a set of forms for use by notaries public, will be found in Circular No. ²⁷₁₀₃₀₋₁₀₃₉, dated 19th July, 1883, published in the Supplement to the *Gazette of India* for 21st July, 1883, p. 1347.

INTRODUCTION TO THE TRANSFER OF PROPERTY ACT.

THE chief objects of this Act are two: first, to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the complement of the work commenced in framing the law of intestate and testamentary succession, and, secondly, to complete the Code of contract law, so far as relates to immoveable property. In aiming at these objects, the legislature has striven to avoid refinements and technicalities, to discard all rules whereby the parties to a transaction were made liable to unexpected consequences, all rules which seemed unfair or inexpedient in themselves, all provisions in deeds which were found in practice to lead to embarrassment and litigation. Like the Contract Act, it is not, and does not purport to be, an exhaustive measure.

PRELIMINARY.

Chapter I contains preliminary provisions, of which the most important are the saving of local usages recognised by the legislature in those *pays de coutumes* the Panjáb and Oudh (sec. 2, cl. a); the clause (sec. 2, cl. d) leaving Natives under the rule against perpetuity enunciated by the Courts; the definition of 'notice' (sec. 3, cl. c); and the declaration (sec. 4) that the parts of the Act relating to contracts shall be taken as part of the Indian Contract Act, 1872.

TRANSFERS BY ACT OF PARTIES.

Effect of transfer.

Chapter II is divided into two parts, one containing rules as to the transfer of all property, whether moveable or immoveable: the other relating solely to immoveable property. After defining 'transfer,' it declares (sec. 6) that property of any kind may be transferred, except in the cases there specified¹, and that every person competent to contract may transfer it (sec. 7). It also declares that a transfer may be made without writing in every case in which a writing is not expressly required by law. Section 8 declares the operation of a transfer of property, and mentions the legal incidents thereof in the cases of land, machinery attached to the earth, a house, an actionable claim, and property yielding

¹ The section to some extent follows the analogy of the Code of Civil Procedure, sec. 266, clauses (e), (g), (h), and (k), as to property which may be attached.

income. No mention is made of mines and minerals. Except where the right of Government to them is reserved by the legislature¹, they pass by a grant of the land containing them. But sec. 108 (a) restrains a lessee from opening new mines. Section 9 declares the validity of oral transfers except where the law expressly requires a writing. The general invalidity of conditions absolutely restraining alienation is declared by sec. 10. Exceptions are made in the case of lessees and of married women not belonging to the Hindú, Muhammadan, or Buddhist community. Section 11 deals with qualified restrictions repugnant to interests created on a transfer. It corresponds with the Succession Act, sec. 125. Conditions making interests determinable on the transferee's insolvency or attempted alienation are made void by section 12, except in the case of a lessee. Sections 13-17 place restrictions on the power of tying up property by a transaction *inter vivos*, similar to those imposed by the Succession Act, secs. 100-104, in the case of wills. These restrictions do not apply to transfers made for the benefit of the public. The Mortmain Act does not apply to India, and nothing of the kind is in force there *inter vivos*, except, in Oudh, Act I of 1869, secs. 18, 20. The effect of a direction to accumulate income is declared by section 18. It is valid only in respect of the income arising within the year next after the date of the transfer. Vested and contingent interests are dealt with in secs. 19-21; and the effect of creating interests in favour of the members of a class who attain a particular age, or contingent on the happening of a specified uncertain event, or accruing to such of certain persons as survive at some period not specified, is declared by secs. 22-24. The chief rules relating to interests dependent on the fulfilment of a condition, precedent or subsequent, will be found in secs. 25-34.

Mines and minerals.

Conditions.

Restrictions on power to settle.

Direction to accumulate.

Where *A* professes to transfer *B*'s property, and as part of the same transaction confers a benefit on *B*, *B* must elect either to confirm, or dissent from, the transfer. This subject is handled by sec. 35, which corresponds with the rules in the Succession Act, secs. 168-177.

Election.

The apportionment of rents and other periodical payments on the transfer of the interest of the person entitled, and the apportionment of the benefit of an obligation relating to property on its severance, are dealt with by secs. 36 and 37.

Apportionment.

The remaining sections of this chapter refer only to immoveable property. The Act treats with some particularity of the title which the transferor of such property can confer, and of the protection

¹ See in Bombay, Bom. Act V of 1881, sec. 151: in Burma, Act II of 1879, sec. 69: in the Panjáb, Act 1876, sec. 8 (b): in Ajmer, Reg. II of XXXIII of 1871, sec. 29: in the Central Provinces, Act XVIII of 1879, sec. 8 (a).

value than Rs. 100 the transfer may be made either by a registered instrument or by delivery of the property. Here the legislature follows the analogy of the Indian Registration Act, III of 1877, sec. 17, cl. (b). The Act discards the doctrine that the mere contract of sale imparts to the buyer, without more, dominion or *ius in rem*, that, in other words, what is agreed to be done is done¹.

Duties of seller. The rights and liabilities of the seller and buyer are then classified as follows :—(a) duties of seller, (b) rights of seller, (c) duties of buyer, (d) rights of buyer. In addition to the duties imposed on the seller, and which, before the Act came into force, were generally recognised by the Indian Courts—such as the disclosure of latent defects—he is bound to produce *all* documents of title relating to the property which are in his possession or power—not merely such as are necessary to deduce a marketable title for the usual or stipulated period. He is bound, between the date of the contract of sale and the delivery, to take due care of the property and the title-deeds in his possession. He is also bound to give, on being so required, the buyer or such person as the buyer directs, such possession of the property as its nature admits, and to pay all public charges and rent accrued due in respect of the property up to the date of sale. He must also pay the interest on all incumbrances due on such date and, except where the property is sold subject to incumbrances, discharge all incumbrances thereon then existing. The implied contracts of a seller of land have been noticed, *supra*, p. 531.

Duties of buyer. The buyer's duties are four in number. He must, first, disclose to the seller any fact as to the nature or extent of the seller's interest of which the buyer is aware, but of which he has reason to believe the seller is not aware, and which materially increases the value of such interest. He must, secondly, pay or tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs. Power to retain the amount of the incumbrances is given to the buyer only where the property is sold free from incumbrances. Thirdly, where the ownership of the property has passed, he must bear any loss arising from the destruction, etc., of the property not caused by the seller; and, lastly, he must, when the ownership has passed, as between himself and the seller, pay all public charges and rent which may become due in respect of the property, the principal due on the incumbrances if any, subject to which the property is sold, and the interest thereon afterwards accruing due.

¹ See Austin, *Jurisprudence*, 4th ed. p. 1001.

The buyer's rights here specified are (1) the right to accidental benefits, such as the dropping of lives on the purchase of a reversion or a sudden rise in the value of land from its being required for a public purpose¹, and (2) a lien for purchase-money paid in anticipation of delivery. Rights of buyer.

Section 56 provides for the case where one of two properties subject to a common charge is sold.

The Chapter concludes with a section founded on 44 & 45 Vic. chap. 41, section 5, providing for the discharge of incumbrances on the sale of encumbered property either by the Court, or in execution of a decree, or out of Court. Discharge of encumbrances on sale In case of an annual or monthly sum charged on the property, this is done by paying into Court such amount as when invested in Government securities will be sufficient, by means of the interest, to keep down the charge. In case of a capital sum charged, the amount to be paid into Court is such as will be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court may declare the property free from incumbrance, and make proper orders for giving effect to the sale and for applying the capital or income of the fund in Court. The corresponding section in 44 & 45 Vic. c. 41 has been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property, and there is reason to believe that it will be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Indian legislature has taken two precautions, first, it has confined the jurisdiction to the High Courts, the District Courts, and any other Courts specially empowered by the Local Governments; and, secondly, it has declared that an appeal shall lie from all directions and orders given under this section.

MORTGAGES.

Chapter IV begins with a general definition of mortgage, and defines the four chief kinds of mortgage used throughout India, the 'simple mortgage' (or hypothec), the mortgage by conditional sale, the usufructuary mortgage, and the mortgage in the ordinary English form. In the case of other kinds the rights and liabilities of the parties are determined by the contract as evidenced by the mortgage-deed, and so far as such contract does not extend by local usage, which, especially in Malabar², is sometimes very elaborate.

A written instrument signed, attested and registered, is com- Formalities.

¹ Dart, 248, 249: Act X of 1870.

² See *A Commentary on Malabar Law and Custom*, by Herbert Wigram,

Madras, 1882, pp. 95-134. The customs of Guzerat as to mortgages seem peculiar, 11 Bom. H. C. 42.

Mortgages by deposit. pulsory whenever the principal money secured is Rs. 100 or upwards. When the principal is less than that sum, registration is dispensed with, and the mortgage may be effected either by a signed and attested instrument, or by delivery of the mortgaged property. There is a saving of mortgages by deposit of title-deeds when the deposit is made in the towns of Calcutta, Madras, Bombay or Rangoon. This saving was introduced by the Select Committee in opposition to the advice of the Law Commissioners. It is opposed to the policy of the registration-law, it leads to evasions of the stamp duty, and it is at variance with the principle of making the system of transferring land as far as possible a system of public transfer.

Rights of mortgagor. The chief rights and liabilities of the mortgagor are then set forth: his right to redeem (secs. 60, 61), his right (in the case of a usufructuary mortgage) to recover possession (sec. 62), his right to accessions to and renewals of the mortgaged property (secs. 63, 64). Annexed to the right to redeem is a provision requiring the mortgagee, in the case of a registered mortgage, either to retransfer the property, or to execute and register an acknowledgment that any right in derogation of the interest transferred to him has been extinguished. The requirement of registration discourages fraud, facilitates investigation of title, and precludes some difficult questions as to priority.

His implied contracts. The implied contracts of the mortgagor are (a) that the interest which he assumes to transfer subsists, and that he has power to transfer it, (b) that he will defend, or if the mortgagee is in possession, enable him to defend, the mortgagor's title, (c) that the mortgagor will, so long as the mortgagee is out of possession, pay the public charges accruing due in respect of the property. Special provision is made where the mortgaged property is a lease for a term of years, and where the mortgage is a second or subsequent incumbrance. The benefit of these contracts is annexed to and goes with the interest of the mortgagee as such.

Waste. The liability of a mortgagor in possession for waste is dealt with by sec. 66. He is not liable for allowing the property to deteriorate. But he must not commit any act which is destructive or permanently injurious thereto,—such as mining under buildings so as to endanger their stability, removing valuable fixtures, or cutting timber,—if the security is insufficient or will be rendered insufficient by that act.

Rights of mortgagee. The rights of the mortgagee are then set forth. They are the rights to foreclosure or sale (sec. 67), to sue, in certain specific cases, for the mortgage-money (sec. 68), to exercise, in certain

specified cases, a power of sale (sec. 69). There are parts of India in which such a power would be abused by Native mortgagées, and the Act therefore declares that such powers are valid only, 1. when the mortgage is in the English form and neither party is a Hindú, Muhammadan, or Buddhist; 2. where the mortgagee is the Secretary of State in Council; and, 3. where the mortgaged property is situate in the towns of Calcutta, Madras, Bombay, Karáchi, or Rangoon. Where accessions are made to the mortgaged property, or a mortgaged lease is renewed, the mortgagee is also entitled, for the purposes of his security, to such accessions or the new lease. Where, during the continuance of the mortgage, he takes possession, his rights to spend and add the expense to the principal are set forth in sec. 72. Under the same section he has a right to insure where the property is by its nature insurable, and the mortgagor has not insured it. Where the property is sold through failure to pay arrears of revenue or rent, the mortgagee has a charge on the surplus, if any, of the proceeds, for the amount due on his mortgage, unless of course the sale has been occasioned by his own default (sec. 74). The right of subsequent mortgagees to pay off and stand in the shoes of prior mortgagees is stated in sec. 74.

Accre-
tions.

The mortgagee's liabilities where he takes possession of the mortgaged property are set forth in secs. 76 and 77. Rules as to the postponement of one mortgagee to another are contained in secs. 78-80, the doctrine of 'tacking' being abolished by the last-mentioned section. Marshalling securities, where the owner of two properties mortgages them both to one person, and then mortgages one of the properties to another person who has not notice of the former mortgage, may be regarded either as the right of one mortgagee or the liability of another. Section 81 contains a rule on this subject.

Liabilities
of mort-
gagee.

Marshall-
ing securi-
ties.

The rateable contribution enforceable (a) where several properties, whether of one or several owners, are mortgaged to secure one debt, and (b) where of two properties belonging to the same owner one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, is provided for by section 82.

Contrib-
ution.

Section 83 extends in substance to the whole of British India (except Bombay, the Panjáb, and Burma), and to every description of mortgage, the provisions as to payment into Court contained in Bengal Regulation 1 of 1798 as to mortgages by conditional sale. Under it any mortgagor or other person entitled to redeem may after the principal has become payable and before a redemption-

Payment
into court
of mort-
gage debt.

suit is barred, deposit in court the amount of the mortgage debt. The Court then causes notice of the deposit to be served on the mortgagee, who may apply and recover the money. Interest ceases on the deposit.

Procedure. The rest of this chapter relates to the procedure in suits between mortgagor and mortgagee. 'Mortgages,' said the Hon. Mr. Evans, when the bill was before the Council, 'were legislated for in Bengal as early as 1798; but as the old Regulations gave a somewhat cumbersome and unsatisfactory procedure and did not cover every class of mortgage, money-lenders had resorted to a simple mortgage-bond, consisting of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree, and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution-sale of the right title and interest of the debtor whatever it might be, it was usual, when the same property was pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchasers to fight out in court the question of what they had bought under their respective sales. There having been no machinery for bringing together into one suit the various incumbrances on the property, endless confusion had been the result, and the decisions of the Courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered.' Section 99 therefore provides that where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not bring it to sale otherwise than by suit under section 67. To this suit all persons interested in the property must be parties (section 85), and under sec. 88 the net proceeds of the sale are applied in payment of what is due to the plaintiff, and the balance is paid to the defendant or other persons entitled to receive it.

LEASES.

Formalities.

Chapter V, after defining 'lease' (sec. 105), and giving a rule (sec. 106) as to the duration of certain leases in the absence of a contract or local law or usage to the contrary, requires all

leases of immoveable property from year to year, or for a term exceeding one year, or reserving a yearly rent, to be made by a registered instrument. This agrees with the rule in the Registration Act (III of 1877), sec. 17, save that it omits the power given by that Act to exempt leases for short terms and for petty rents. It also carries out the policy above referred to of rendering the system of transferring immoveable property as far as possible a system of public transfer. All other leases may be made either by an instrument or by oral agreement. The liabilities of the lessor are then stated. He must disclose to the lessee any material defect in the property with reference to its intended use, of which the former is, and the latter is not, aware, and which the latter could not with ordinary care discover. He must, on the lessee's request, put him in possession. He is deemed to contract that if the lessee pays the rent and performs the contracts binding on him he may hold during the term without interruption, and the lessee is thus protected not only against eviction by title paramount to that of the lessor, but also, it seems, against tortious entries¹. The benefit of this contract is annexed to the lessee's interest as such, and may be enforced by his assigns. Nothing is here said of the lessor's rights, which are correlative to the lessee's liabilities. In particular, the right to distrain is not recognised.

The rights and liabilities of the lessee are then declared. Sub- Rights of
ject to the alluvion-law, he is entitled as lessee to any accessions
made to the property during the continuance of his lease. He may
avoid the lease if any material part of the property is by *vis maior*
wholly destroyed or rendered substantially and permanently unfit
for the purposes for which it was let². If the lessor fails to make
any repairs which he is bound to make, the lessee may make them,
and deduct the expense from the rent: so if the lessor fails to
make any payment which he is bound to make, and which if not
made by him is recoverable from the lessee or against the property.
As to fixtures, he may remove at any time during the lease *all* Fixtures.
things which he has attached to the earth, whether for purposes
of trade, for agricultural purposes, or for ornament or convenience,
provided he leaves the property in the state in which he received
it. As to emblements, when a lease of uncertain duration deter- Emble-
mines otherwise than by the lessee's fault, he or his representatives
may take all the crops planted or sown by him, and growing
on the property at the determination. Lastly, he may, as a rule,

¹ Otherwise in England, Woodfall, 13th ed. pp. 674, 676.

² Otherwise in England, *ibid.* 408.

transfer absolutely, mortgage, or sublet the whole or any part of his interest in the property.

Liabilities
of lessee.

The lessee's liabilities are then enumerated. He must disclose to the lessor any fact as to the nature and extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest. He must pay or tender at the proper time and place the premium or rent. He must keep and restore the property in as good condition as it was when he entered (subject only to reasonable wear and tear and *vis maior*), allow the lessor to enter and inspect and leave notice of defects, and make good such defects when caused by the lessee's acts or default. If he becomes aware of proceedings to recover the property or of any encroachment thereon, he must give notice to the lessor. He may use the property and its products as a person of ordinary prudence would use them if they were his own: but he must not use the property for a purpose other than that for which it was leased, or commit any act destructive or permanently injurious thereto. He must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes. Lastly, when the lease determines, he must put the lessor into possession. The Act is silent as to whether the lessor may enter forcibly into possession.

The rights of the lessee's assign or sub-lessee are noticed in sec. 109.

The Act then contains rules (secs. 110, 111) as to the commencement, continuance, and determination of leases. Where a lease determines by notice to quit or by forfeiture, the forfeiture may be waived, and rules as to this will be found in secs. 112, 113. The Court may relieve against forfeiture for non-payment of rent, and the circumstances under which this may be done are stated in sec. 114.

The effect on an under-lease of a surrender or forfeiture of a lease, and the effect of holding over where the lessor assents to the lessee continuing in possession, are stated respectively in secs. 115 and 116.

As local legislation as to the relation of zamíndár and raiyat is so copious and elaborate, the provisions of this chapter do not apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Government of India, may declare them to be so applicable, together with, or subject to, those of the local law, if any. The chapter in practice therefore applies only to leases of houses, gardens, mines and quarries.

EXCHANGES.

Chapter VI, which applies to moveable as well as to immoveable property, supplies a defect in the Contract Act. After defining 'exchange' in accordance with the draft Civil Code of the State of New York, § 903, it declares (sec. 118) that a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale. The effect of this is to render a registered assurance necessary in the case of an exchange of land worth Rs. 100 and upwards.

Sec. 119, founded on an article in the Code Civil, declares that in the absence of a contract to the contrary, the party deprived of the thing he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation, or to the return of the thing transferred by him.

As regards exchanges of immoveable property, the Act ignores the English rule that there must be an equality in the *quantity* of the estates exchanged. In India, therefore, an estate for life may be exchanged for a term of years.

• GIFTS.

Chapter VII treats of Gifts *inter vivos*, saving donations *mortis causâ* (which are dealt with by the Succession Act, sec. 178) and the rules of Muhammadan law on the subject. It defines 'gifts'; shows how a transfer must be effected for the purpose of making a gift (a) of immoveable property and (b) of moveable property; requires a registered instrument in the case of gifts of land of whatever value (cf. Act III of 1877, sec. 17, clause a), and, in the case of gifts of moveables, whenever the property given is not delivered: declares that a gift comprising both existing and future property is void as to the latter, and that a gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted: shows when a gift may be suspended or revoked; and deals with onerous and with universal gifts of the donor's whole property. Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud section 53 provides when the property is land. But an universal gift may conceivably be honest and comprise moveable property. Section 128 therefore specially provides for such gifts.

The rules of Hindú and Buddhist law are saved from the provisions of this chapter, except only that which requires, in the case of a gift of land, writing, registration and attestation. The rules

that a Hindú father may, in case of necessity, resume gifts made to his son¹, and that an undivided coparcener cannot give joint family property to a relative, much less to a stranger², thus remain unaffected.

ACTIONABLE CLAIMS.

Chapter VIII relates to the transfer of actionable claims, i.e. claims which the civil courts recognise as affording grounds of relief. It gives rules as to the application and extent of the warranty of the solvency of a debtor. It declares that, as a rule, when an actionable claim is sold, he against whom it is made is discharged by paying the buyer the price and incidental expenses of the sale with interest from the date of payment. Section 136 renders it illegal for a judge, pleader, or other officer connected with courts of justice to buy any actionable claim falling under the jurisdiction of the court in which he exercises his functions. Lastly, the chapter contains rules as to mortgages of debts. It does not apply to negotiable instruments.

History of the Act. The kernel of the bill which became the Transfer of Property Act was a draft prepared in England by the Indian Law Commission, which was sent out to India in 1870, by the Duke of Argyll, then Secretary of State, with instructions to take the necessary steps for passing it into law. It contained rules as to 'assurances' of immoveable property; charges; leases; settlements; apportionment; certain rights and liabilities of limited owners; the discretion of the Courts to deal with settled land; powers; joint-ownership; fourteen sections about trusts and the assignment of choses in action. It was heterogeneous, ill-arranged, and ill-drawn, and parts of it were neither necessary nor expedient. The sections on powers, for instance, were unnecessary, and those relating to charges were inexpedient, as they would have given a mortgagee nothing but a right to have the amount of his debt raised by sale of the property pledged to him. No mortgagee was to take possession of the mortgaged land; no mortgagee was to foreclose. Not only the English, but all the Native forms of mortgage were ignored. It was felt by Mr. (now Lord) Hobhouse, the then law-member of the Governor-General's Council, that the amount of simplicity gained would not justify the amount of disturbance created.

However, in obedience to the orders of the Secretary of State, the Bill, with some slight amendments by Mr. Hobhouse and myself, was introduced in 1877, referred to a Select Committee, and circulated

¹ *Dáyabhága*, ii. 57.

² 9 *Mad.* 273. See Mayne, *H. L.* § 328.

to the Local Governments for publication and translation. A mass of criticism and suggestion came in, and the bill was revised by the writer and republished in 1878, and a second time sent to the Local Governments. Another mass of criticism came in, and it became clear that the bill, if it were to go on at all, must be relieved of the mass of unnecessary matter, and made more homogeneous, confined, in other words, to the subject of the transfer of property by act of parties, that is to say by contract or gift. The bill was therefore recast, circulated for a third time to the Local Governments, and referred to a commission composed of Sir Charles Turner, Mr. Justice West, and the writer. This commission, of which the writer was both president and draftsman, made several amendments, both in the wording and substance of the bill; but the important additions were only three. First, they set out in full on the face of the bill several rules applying to transactions *inter vivos* which in the original draft were only expressed by way of reference, *mutatis mutandis*, to certain sections of the Succession Act dealing with (e.g.) election, contingent bequests, conditional bequests, and bequests with directions as to application and enjoyment, and which therefore would never have been applied by unprofessional judges without risk of serious error. Secondly, they required, at the suggestion of Sir Henry Maine, who was a strong advocate of the continental system of a public transfer of land, a written and registered instrument in certain cases of sales, mortgages, leases, exchanges, and gifts of immoveable property. Thirdly, at the suggestion of one of the Hindú critics of the bill, they inserted a chapter on Gifts.

The recommendations of this Commission were duly communicated to the Select Committee. Most of the changes proposed were adopted and the bill became law in 1882. Judging from the Indian Law Reports of the last four years, and from the almost complete absence of amending legislation, it has worked smoothly, and, except in one instance, given rise to no serious doubts as to its meaning or effect. The question referred to is whether the provisions of the Act relating to procedure apply to mortgages executed before it came into force? Both the High Courts at Allahabad and Calcutta have answered this question in the affirmative.

THE TRANSFER OF PROPERTY ACT, 1882.

CONTENTS.

Preamble.

CHAPTER I.

PRELIMINARY.

	SECTION
Short title	1
Commencement	<i>ib.</i>
Extent	<i>ib.</i>
Repeal of Acts	2
Saving of certain enactments, incidents, rights, liabilities, &c.	<i>ib.</i>
Interpretation-clause	3
Enactments relating to contracts to be taken as part of Act IX of 1872	4

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A)—TRANSFER OF PROPERTY, WHETHER MOVEABLE OR IMMOVEABLE.

'Transfer of property' defined	5
What may be transferred	6
Persons competent to transfer	7
Operation of transfer	8
Oral transfer	9
Condition restraining alienation	10
Restriction repugnant to interest created	11
Condition making interest determinable on insolvency or attempted alienation	12
Transfer for benefit of unborn person	13
Rule against perpetuity	14
Transfer to class some of whom come under sections 13 and 14	15
Transfer to take effect on failure of prior transfer	16
Transfer in perpetuity for benefit of public	17
Direction for accumulation	18
Vested interest	19
When unborn person acquires vested interest on transfer for his benefit	20
Contingent interest	21
Transfer to members of a class who attain a particular age	22
Transfer contingent on happening of specified uncertain event	23
Transfer to such of certain persons as survive at some period not specified	24
Conditional transfer	25
Fulfilment of condition precedent	26
Conditional transfer to one person coupled with transfer to another on failure of prior disposition	27

CONTENTS.

741

	SECTION
Ulterior transfer conditional on happening or not happening of specified event	28
Fulfilment of condition subsequent	29
Prior disposition not affected by invalidity of ulterior disposition	30
Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen	31
Such condition must not be invalid	32
Transfer conditional on performance of act, no time being specified for performance	33
Transfer conditional on performance of act, time being specified	34
ELECTION.	
Election when necessary	35
APPORTIONMENT.	
Apportionment of periodical payments on determination of interest of person entitled	36
Apportionment of benefit of obligation on severance	37
(B)—TRANSFER OF IMMOVEABLE PROPERTY.	
Transfer by person authorised only under certain circumstances to transfer	38
Transfer where third person is entitled to maintenance	39
Burden of obligation imposing restriction on use of land, or of obligation annexed to ownership but not amounting to interest or easement	40
Transfer by ostensible owner	41
Transfer by person having authority to revoke former transfer	42
Transfer by unauthorised person who subsequently acquires interest in property transferred	43
Transfer by one co-owner	44
Joint transfer for consideration	45
Transfer for consideration by persons having distinct interests	46
Transfer by co-owners of share in common property	47
Priority of rights created by transfer	48
Transferee's right under policy	49
Rent <i>bond fide</i> paid to holder under defective title	50
Improvements made by <i>bond fide</i> holders under defective titles	51
Transfer of property pending suit relating thereto	52
Fraudulent transfer	53

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

'Sale' defined	54
Sale how made	<i>ib.</i>
Contract for sale	<i>ib.</i>
Rights and liabilities of buyer and seller	55
Sale of one of two properties subject to a common charge	56
DISCHARGE OF INCUMBRANCES ON SALE.	
Provision by Court for incumbrances and sale freed therefrom	57

CHAPTER IV.

OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES.

	SECTION
'Mortgage,' 'mortgagor,' and 'mortgagee' defined	58
Simple mortgage	<i>ib.</i>
Mortgage by conditional sale	<i>ib.</i>
Usufructuary mortgage	<i>ib.</i>
English mortgage	<i>ib.</i>
Mortgage when to be by registered instrument	59
RIGHTS AND LIABILITIES OF MORTGAGOR.	
Right of mortgagor to redeem	60
Redemption of portion of mortgaged property	<i>ib.</i>
Right to redeem one of two properties separately mortgaged	61
Right of usufructuary mortgagor to recover possession	62
Accession to mortgaged property	63
Accession acquired in virtue of transferred ownership	<i>ib.</i>
Renewal of mortgaged lease	64
Implied contracts by mortgagor	65
Waste by mortgagor in possession	66
RIGHTS AND LIABILITIES OF MORTGAGEE.	
Right to foreclosure or sale	67
Right to sue for mortgage-money	68
Power of sale when valid	69
Accession to mortgaged property	70
Renewal of mortgaged lease	71
Rights of mortgagee in possession	72
Charge on proceeds of revenue-sale	73
Right of subsequent mortgagee to pay off prior mortgagees	74
Rights of mesne mortgagee against prior and subsequent mortgagees	75
Liabilities of mortgagee in possession	76
Loss occasioned by his default	<i>ib.</i>
Receipts in lieu of interest	77
PRIORITY.	
Postponement of prior mortgagees	78
Mortgage to secure uncertain amount when maximum is expressed	79
Tacking abolished	80
MARSHALLING AND CONTRIBUTION.	
Marshalling securities	81
Contribution to mortgage-debt	82
DEPOSIT IN COURT.	
Power to deposit in Court money due on mortgage	83
Right to money deposited by mortgagor	<i>ib.</i>
Cessation of interest	84
SUITS FOR FORECLOSURE, SALE OR REDEMPTION.	
Parties to suits for foreclosure, sale and redemption	85
FORECLOSURE AND SALE.	
Decree in foreclosure-suit	86

	SECTION
Procedure in case of payment of amount due	87
Order absolute for foreclosure	<i>ib.</i>
Power to enlarge time	<i>ib.</i>
Decree for sale	88
Power to decree sale in foreclosure-suit	<i>ib.</i>
Procedure when defendant pays amount due	89
Order absolute for sale	<i>ib.</i>
Recovery of balance due on mortgage	90

REDEMPTION.

Who may sue for redemption	91
Decree in redemption-suit	92
In case of redemption, possession	93
In default, foreclosure or sale	<i>ib.</i>
Power to enlarge time	<i>ib.</i>
Costs of mortgagee subsequent to decree	94
Charge of one of several co-mortgagors who redeems	95

SALE OF PROPERTY SUBJECT TO PRIOR MORTGAGE.

Sale of property subject to prior mortgage	96
Application of proceeds	97

ANOMALOUS MORTGAGES.

Mortgage not described in section 58, clauses (b), (c), (d), and (e)	98
--	----

ATTACHMENT OF MORTGAGED PROPERTY.

Attachment of mortgaged property	99
--	----

CHARGES.

Charges	100
Extinguishment of charges	101

NOTICE AND TENDER.

Service or tender on or to agent	102
Notice &c. to or by person incompetent to contract	103
Power to make rules	104

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

Lease defined	105
Lessor, lessee, premium and rent defined	<i>ib.</i>
Duration of certain leases in absence of written contract or local usage	106
Leases how made	107
Rights and liabilities of lessor and lessee	108
Rights of lessor's transferee	109
Exclusion of day on which term commences	110
Duration of lease for a year	<i>ib.</i>
Option to determine lease	<i>ib.</i>
Determination of lease	111
Waiver of forfeiture	112
Waiver of notice to quit	113
Relief against forfeiture for non-payment of rent	114

	SECTION
Effect of surrender and forfeiture on under-leases	115
Effect of holding over	116
Exemption of leases for agricultural purposes	117

CHAPTER VI.

OF EXCHANGES.

'Exchange' defined	118
Right of party deprived of thing received in exchange	119
Rights and liabilities of parties	120
Exchange of money	121

CHAPTER VII.

OF GIFTS.

'Gift' defined	122
Acceptance when to be made	<i>ib.</i>
Transfer how effected	123
Gift of existing and future property	124
Gift to several, of whom one does not accept	125
When gift may be suspended or revoked	126
Onerous gifts	127
Onerous gift to disqualified person	<i>ib.</i>
Universal donee	128
Saving of donations <i>mortis causa</i> and Muhammadan law	129

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

Actionable claim	130
Transfer of debts	131
Notice to be in writing signed	132
Debtor to give effect to transfer	133
Warranty of solvency of debtor	134
Discharge of person against whom claim is sold	135
Incapacity of officers connected with Courts of justice	136
Liability of transferee of debt	137
Mortgaged debt	138
Saving of negotiable instruments	139

THE SCHEDULE—ENACTMENTS REPEALED.

ACT No. IV OF 1882.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 17th February,
1882.)

An Act to amend the law relating to the Transfer of Property by act of Parties.

WHEREAS it is expedient to define and amend certain parts Preamble.
of the law relating to the transfer of property by act of
parties¹; It is hereby enacted as follows :

CHAPTER I.

PRELIMINARY.

1. This Act may be called ' The Transfer of Property Act, Short title.
1882 ' ;

It shall come into force on the first day of July, 1882 ;

It extends in the first instance to the whole of British
India except the territories respectively administered by the
Governor of Bombay in Council, the Lieutenant-Governor of
the Panjáb, and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to
time, by notification in the local official Gazette, extend this
Act to the whole or any specified part of the territories under
its administration ².

¹ As to transfer by act of law, see *Empress v. Burah*, 4 Cal. 172, 182, per
infra, sec. 2, cl. (d). Lord Selborne.

² That such a provision is valid see

Commence-
ment.
Extent.

Power to
exempt.

And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government, from all or any of the following provisions, namely, sections 54, paragraphs two and three, 59, 107, and 123¹.

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs two and three, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise².

Repeal of
Acts.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect³—

Saving of
certain en-
actments,
incidents,
rights, lia-
bilities, &c.

(a) the provisions of any enactment not hereby expressly repealed⁴:

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force:

(c) any right or liability arising out of a legal relation constituted before this Act comes into force⁵, or any relief in respect of any such right or liability⁶: or

(d) save as provided by section 57 and chapter IV of this

¹ This clause is here printed as amended by Act III of 1885, sec. 1.

² This clause was added by the same Act, sec. 2.

³ i. e. *in malam partem*.

⁴ The effect of this is to maintain intact the statutory force which the Indian legislature had given to local usage in the Panjáb (Act IV of 1872, sec. 7) and Oudh (Act XVIII of 1876, secs. 4, 8). Local usages are saved also by secs. 36, 98, 106, 108, *infra*.

⁵ Such as, for instance, a right of pre-emption, 4 Ben. A. C. 219: the right of the holder of a decree authorising the sale of property hypothecated to him, 12 Cal. 437: the right to relief against a penal clause in a

lease, 6 Mad. 330. See too 8 All. 402.

⁶ This, of course, does not save the procedure in foreclosure which existed (under Ben. Reg. XVII of 1806, secs. 7, 8) when the mortgage was made, 6 All. 262, followed in 12 Cal. 583. 'No one has a vested right in any particular form of procedure,' per James L.J., *Warner v. Murdoch*, L. R., 4 Ch. Div. 752. But the words 'any relief in respect of any such right or liability' preserve to a *bai-bil-wafa* mortgagor the right which he had under Ben. Reg. XVII of 1806 to pay off the mortgage-money, and thus prevent the mortgage being foreclosed, within one year from the date of notice, 11 Cal. 587; and see 12 Cal. 436; 8 All. 402, 405.

Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction ¹:

And nothing in the second chapter of this Act shall be deemed to affect any rule of Hindú, Muhammadan or Buddhist law ².

3. In this Act, unless there is something repugnant in the subject or context,—

‘immoveable property’ does not include standing timber, growing crops or grass:

‘instrument’ means a non-testamentary instrument:

‘registered’ means registered in British India under the law for the time being in force regulating the registration of documents:

‘attached to the earth’ means—

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

and a person is said to have ‘notice’ of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search ³ which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229 ⁴.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

And sections 54, paragraphs two and three, 59, 107, and 123 shall be read as supplemental to the Indian Registration Act, 1877 ⁵.

¹ 2 Bom. 541. That a decree for specific performance of a contract for the sale of immoveable property, coupled with the payment of the purchase-money, is enough to transfer the ownership to the vendee, see 5 Bom. 559-560.

² This saves the rule that Native religious endowments cannot be transferred. It also exempts settlements made by Natives from the statutory rule against perpetuities contained in

sec. 14. It leaves untouched the decisions of the Judicial Committee in 8 Moo. I. A. 66 and the Tagore Case, 9 Ben. 377, and of the Indian Courts in 7 Cal. 269 and 2 Ben. O. C. J. 11.

³ in a book or index kept under the Registration Act.

⁴ i.e. in the course of the business transacted by him for the principal. See more as to notice 11 Ben., P.C., 54.

⁵ This clause was added by Act III of 1885, sec. 3.

Interpretation-clause.

‘immoveable property’:

‘instrument’:

‘registered’:

‘attached to the earth’:

Enactments relating to contracts to be taken as part of Act IX of 1872.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A.)—TRANSFER OF PROPERTY, WHETHER MOVEABLE OR IMMOVEABLE.

'Transfer of property' defined.

5. In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and 'to transfer property' is to perform such act.

What may be transferred.

6. Property of any kind¹ may be transferred², except as otherwise provided by this Act or by any other law for the time being in force³:

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred⁴.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby⁵.

(c) An easement cannot be transferred apart from the dominant heritage⁶.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him⁷.

¹ e.g. the right of worshipping a goddess and receiving a share of the offerings may be transferred to a competent person within the line of succession, 6 Bom. 298. This section seems to allow Hindú and Muhamadan religious and charitable endowments to be transferred, the 'other law' excepted in the first clause being only a law *ejusdem generis* with the present Act, i.e. a legislative enactment. That the corpus of *devasthan*, *sevasthan* and *waqf* is not alienable, though the annual revenues of such endowments may be occasionally pledged for purposes essential to the

institution endowed, see L. R. 2 I. A. 145; 5 Bom. 396, and cases there cited; and this rule is saved by the last clause of sec. 2, *supra*, p. 747.

² 5 All. 121, 137, per Mahmud J.

³ See, for instance, the Garo Hills Regulation, 1882, sec. 4: the Ajmer Land and Revenue Regulation, 1877, sec. 36.

⁴ *Carleton v. Leighton*, 3 Mer. 667: Act X of 1877, sec. 266, cl. (k).

⁵ *Smith v. Packhurst*, 3 Atk. 139.

⁶ See *infra*, the Easements Act, V of 1882, sec. 4.

⁷ e.g. an hereditary priestly office (but it has been held that such an

(e) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred¹.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable².

(g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby³, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee⁴.

(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee⁵.

7. Every person competent to contract⁶ and entitled to transferable property⁷, or authorised to dispose of transferable property not his own, is competent to transfer such property

Persons
competent
to transfer.

office may be sold to the person next in succession to the vendor, 6 Bom. H. C., A. C. J. 250: a *karaima* right, 3 Mad. H. C. 380: the right of a joint Hindú family to worship an idol, 3 Suth. Civ. R. 152: the interest of one of two widows of the same husband in one undivided estate, 2 Mad. 194. The inalienability of a *rāj* depends on family custom, which must be proved, L. R. 8 I. A. 248, following 5 Moo. I. A. 82.

¹ 3 Bom. 406: 5 All. 207. 'The right to complain of a fraud is not a marketable commodity,' *De Hoghton v. Money*, L. R., 2 Ch. App. 169, per Turner L.J.

² 3 Moo. I. A. 435: 11 & 12 Vic. c. 21, s. 27.

³ 4 Mad. 391 (office and emoluments of a *paricharaka*).

⁴ As to the general inalienability of property devoted to religious purposes, see *supra*, p. 748, note 1. The alienation of hereditary religious trusts and offices is generally illegal, though in some special circumstances it may be valid, 6 Mad. 78, 79. As to attempted transfers of the rights of

sebaits to perform the worship of idols, 6 Bom. 300: of the right to manage a temple and its property, 5 Mad. 89; L. R. 4 I. A. 76, and see 4 Mad. 391, 4 All. 81: of jewels used in religious worship, 7 Mad. H. C. 210: of tarawād property in Malabar, except in case of adequate family necessity, 3 Mad. H. C. 294.

A decree enforcing a right of pre-emption, being purely personal in its character, cannot be transferred so as to entitle the purchaser to execute the decree, 7 All. 109.

⁵ Clause (i) was added by Act III of 1885. Of course the rights of a Hindú unborn son to ancestral property (8 Mad. 89) are not affected by sec. 6 or sec. 8. See the saving in sec. 2, last clause.

⁶ See the Contract Act, sec. 11, *supra*, p. 552.

⁷ When the British Government to reward the past services of A gave four villages to him and his heirs for ever 'as jāghir,' it was held that the words 'as jāghir' did not control the right of alienation inherent in the operative terms of the grant, 9 Bom. 561.

either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force ¹.

Operation
of transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest ² which the transferor is then capable of passing in the property ³, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto ⁴, the rents and profits thereof accruing after the transfer, and all things attached to the earth ⁵;

and, where the property is machinery attached to the earth ⁶, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Oral
transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law ⁷.

Condition
restraining
alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person

¹ Where a Hindú widow transfers to a person with notice, to an extent much more than the justifying purpose requires, the reversioner may sue to have the transfer declared valid only as a mortgage for the amount which should properly have been raised, 8 Mad. 93.

² See L. R. 11 Ind. App. 228: S. C. 11 Cal. 131: so now in England, 44 & 45 Vic. s. 63.

³ but no greater right, 6 Moo. I. A. p. 539: 7 Bom. 540. No mention is made of mines and minerals: see p.

727, supra.

⁴ As to the effect of the words 'belonging' and 'therewith held or used,' see 7 Cal. 665.

⁵ See sec. 3, supra, p. 747. As to trees, see 5 All. 616: 2 N. W. P. 252: 24 W. R. 330. As to buildings, 2 Suth. Civ. R. 125, col. 2: 14 Suth. Civ. R. 379.

⁶ See the definition, sec. 3 supra.

⁷ See *Flory v. Denny*, 7 Exch. 581. For instances in which a writing is expressly required, see infra, sec. 59, and supra, pp. 496, 497.

claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void¹, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him²: provided that property may be transferred to or for the benefit of a woman (not being a Hindú, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein³.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction⁴.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void⁵.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him⁶.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same person.

¹ 4 All. 518: 7 All. 522: see 1 All. 126. The rule agrees with Hindú law, 4 Mad. 200, and with Muhammadan law, 6 Mad. H. C. 356.

² As to the effect of such a condition in a permanent lease, 7 Bom. 260, 265. See too 3 Chan. Div. 148, 285.

³ As to gifts to the separate use of a Parsi woman married or about to be married, 5 Bom. 268. Sec. 10 does not give a restraint on anticipation a greater effect than it had before the

passing of the Act, 12 Cal. 522, and there seems nothing in the section inconsistent with Hindú law, 7 All. 522.

⁴ Compare Act X of 1865, sec. 125, supra, p. 404; and see 8 All. 455: 4 Mad. 200: 6 Mad. 356.

⁵ Act X of 1865, sec. 107.

⁶ So in England a clause in a lease is valid which gives the lessor landlord a right of re-entry in case the lessee becomes insolvent, 7 Bom. 261: 5 Dav. Conv. 177, note.

transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property¹.

Illustration.

A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

Rule
against
perpetuity.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong².

Transfer
to class
some of
whom
come under
sections
13 and 14.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14 such interest fails as regards the whole class³.

Transfer to
take effect
on failure
of prior
transfer.

16. Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails⁴.

Transfer in
perpetuity
for benefit
of public.

17. The restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Direction
for accu-
mulation.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed⁵.

¹ Compare Act X of 1865, sec. 100, *supra* p. 100.

² Compare Act X of 1865, sec. 101.

³ Act X of 1865, sec. 102. *Bentinck*

v. Duke of Portland, 7 Chan. Div. 693.

⁴ Compare Act X of 1865, sec. 103.

⁵ Compare Act X of 1865, sec. 104.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed ¹.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer. Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person ².

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth. When unborn person acquires vested interest on transfer for his benefit.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the Contingent interest.

¹ Act X of 1865, sec. 104.

² Ibid. sec. 106.

event, in the latter, when the happening of the event becomes impossible¹.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age².

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist³.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer⁴.

Illustrations.

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

Conditional transfer.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law,

¹ Compare Act X of 1865, secs. 99, 107; Act IX of 1872, sec. 33.

² Compare Act X of 1865, sec. 108.

³ Cf. Act X of 1865, secs. 61, 111.

⁴ Cf. Act X of 1865, sec. 112.

or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy¹.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with².

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D*, and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D*, and *E*. *B* marries without the consent of *C*, *D*, and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor³.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner⁴.

¹ Cf. Act X of 1865, secs. 113, 114, expanded with reference to Act IX of 1872, sec. 23.

² Cf. Act X of 1865, sec. 115.

³ Cf. Act X of 1865, sec. 116.

⁴ Cf. Act X of 1865, sec. 117.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and if he should neglect to do so, to *C*. *B* dies in *A*'s life-time. The disposition in favour of *C* takes effect.

(b) *A* transfers property to his wife; but in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25, and 27¹.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled².

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies a minor or marries without *C*'s consent, the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C*'s consent. The transfer to *D* takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it³.

Illustration.

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

Condition that transfer shall

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition

¹ Act X of 1865, sec. 118.

² Act X of 1865, sec. 119.

³ Act X of 1865, sec. 120.

superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen¹.

Illustrations.

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest².

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act³.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or

cease to have effect in case specified uncertain event happens or does not happen.

Such condition must not be invalid.

Transfer conditional on performance of act, no time being specified for performance.

Transfer conditional on performance of act, time being specified.

¹ Act X of 1865, sec. 121.

² Act X of 1865, sec. 122. A gift to which an immoral condition is at-

tached remains a good gift, while the condition is void, 6 All. 321.

³ Act X of 1865, sec. 123.

indefinitely postponed, the condition shall as against him be deemed to have been fulfilled¹.

ELECTION.

Election
when
necessary.

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of²,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultānpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own³.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect⁴.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom⁵.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the

¹ Act X of 1865, sec. 124.

² Act X of 1865, sec. 168. As to the doctrine of election, see 2 Spence, 585.

³ Act X of 1865, sec. 169.

⁴ Act X of 1865, sec. 171.

⁵ Act X of 1865, sec. 172.

property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances¹.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent².

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done³.

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer⁴.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority⁵.

¹ Act X of 1865, sec. 173.

² Act X of 1865, sec. 174.

³ Act X of 1865, sec. 175.

⁴ Act X of 1865, sec. 176.

⁵ Act X of 1865, sec. 177.

Illustration.

A, a Hindú, transfers Sultánpur to his sister-in-law *B*, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, *A* will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. *A* sells the specified villages to *C*, who buys in good faith, without notice of the agreement. *B* is dispossessed of Sultánpur. She has no claim on the villages transferred to *C*.

Burden of obligation imposing restriction on use of land,

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon¹,

such right or obligation may be enforced against a transferee with notice² thereof or a gratuitous transferee of the property affected thereby; but not against a transferee for consideration and without notice² of the right or obligation, nor against such property in his hands³.

Illustration.

A contracts to sell Sultánpur to *B*. While the contract is still in force he sells Sultánpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

Transfer by ostensible owner.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith⁴.

¹ See 2 All. 162 (covenant running with the land).

² See in England as to restrictive covenants *Wilson v. Hart*, L. R. 1 Ch. App. 463; *Richards v. Revitt*, 7 Ch. Div. 224; *McLean v. McKay*, L. R.

5 P. C. 327.

³ Compare Act IX of 1872, sec. 108, exc. 2.

⁴ See 8 All. 409; 11 Ben. 52; and sec. 3, last clause, supra p. 747.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B*'s lease subject to the opinion of the surveyor as to *B*'s use of the house having been detrimental to its value.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists¹.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindú who has separated from his father *B*, sells to *C* three fields, *X*, *Y*, and *Z*, representing that *A* is authorized to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying, *A* as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to

Transfer by one co-owner.

¹ Canadian Code, sec. 1488. As to a purchaser's power to require the vendor to perfect a defective title, see *Sugd. V. & P.*, 14th ed., 355; *Dart*, 5th ed., 808, 809. In an unreported case cited in *Macpherson, Mortgages*, 7th ed. p. 639, *Wilson J.* held that where a mortgagor purported to convey par-

ticular property and had not the title under which he professed to convey, the mortgage must be satisfied out of any title which the mortgagor then has, or afterwards acquires, in the same property. It matters not that the subsequent acquisition is for valuable consideration.

joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Joint
transfer
for con-
sideration.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced¹.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Transfer
for con-
sideration
by persons
having
distinct
interests.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(a) *A*, owning a moiety, and *B* and *C*, each a quarter share, of mauza Sultánpur, exchange an eighth share of that mauza for a quarter share of mauza Lálpara. There being no agreement to the contrary, *A* is entitled to an eighth share in Lálpara, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A*, being entitled to a life-interest in mauza Atrali and *B*

¹ Compare Dart, 5th ed., 923-4.

and *C* to the reversion, sell the mauza for Rs. 1,000. *A*'s life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money, *B* and *C* to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners of share in common property.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultánpur, transfer a two-anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half-anna share from each of the shares of *B* and *C*.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created¹.

Priority of rights created by transfer.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property².

Transferee's right to policy moneys.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards

Rent bond *vide* paid to holder under defective title.

¹ See 7 All. 572, per Mahmud J.: 8 All. 409.

² *Garden v. Ingram*, 23 L. J. Ch. 478: 2 Fisher, 1077: 2 Dart, 812.

appear that the person to whom such payment or delivery was made had no right to receive such rents or profits¹.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice² of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Improvements made by *bona fide* holders under defective titles.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee³, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement⁴.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Transfer of property pending suit relating thereto.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose⁵.

¹ Act XI of 1855, sec. 1: 2 Fisher, 927-929.

² Sec. 3, *supra*, p. 747.

³ See as to the right to improvements made on land in the Mufassal, 6 *Suth. Civ. R.* 228: 9 *ibid.* 115, col. 2: 6 *Bom. H. C.*, A. C. J. 80.

⁴ Act XI of 1855, sec. 2: 2 *Bom.* 225.

⁵ Cases on *lis pendens* were of frequent occurrence in the Indian Courts; see, for instance, in Bengal, 7 *Suth. Civ. R.* 225: 10 *Suth.* 469: 15 *Suth.* 372: 21 *Suth.* 349: 23 *Suth.* 382: 4 *Cal.* 789: 12 *Cal.* 299: 8 *Ben.*

53. Every transfer of immoveable property, made with ^{Fraudulent} intent to defraud prior or subsequent transferees thereof for ^{transfer.} consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor¹, is voidable at the option of any person so defrauded, defeated or delayed².

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith³ and for consideration⁴.

478: in the N. W. Provinces, 3 N. W. P. 301; 2 All. 826; 6 All. 444: in Bombay, 11 Bom. H. C. 24, 64, 139; 8 Bom. A. C. J. 55; 4 Bom. 34; 6 Bom. 168, 567: in Madras, 5 Mad. 372; 7 Mad. 96. The doctrine stated in this section rests, not upon constructive notice, but upon the fact that it would be impossible to bring any suit to a successful termination if alienations *pendente lite* were permitted to prevail, 6 Bom. 173, following *Bellamy v. Sabine*, 1 De G. & J. 566.

This section should be read with sec. 12 of the Code of Civil Procedure. It does not apply to execution-sales (sec. 2, cl. d), as to which see 1 All. 590; 2 Tayl. & B. 590; 7 Mad. H. C. 104.

¹ 7 Suth. Civ. R. 513; 10 Cal. 616; S. C., L. R. 11 Ind. App. 10, and see p. 174. When a man, pending a suit against him, conveys

away his property, the conveyance may very reasonably be presumed to have been executed to defeat his creditors, in the absence of proof to the contrary, Sev. 31 (1863), per Peacock C.J., and see 6 Moo. I. A. 27.

² But the transfer is binding as between the parties thereto, 7 Bom. 78.

³ See 6 Bom. 197; 7 Cal. 763; and *Twyne's Case*, 1 Smith, L. C. 1.

⁴ Act I of 1877, sec. 35. A party in possession under a fraudulent transfer has been held disentitled to any allowance for sums expended by him for improvements upon the estate, 6 Moo. I. A. 27. As to voluntary alienations, 2 All. 891. As to assignments to trustees for the benefit of creditors, 3 All. 799.

Sec. 53 replaces the statutes of Elizabeth which are repealed by this Act.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

'Sale' defined.

54. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.

Such transfer, in the case of tangible immoveable property¹ of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered¹ instrument².

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered¹ instrument or by delivery of the property³.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property⁴.

Contract for sale.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property⁵.

Rights and liabilities of buyer and seller.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

¹ Sec. 3 supra, p. 747.

² i. e. a non-testamentary instrument, supra sec. 3. Clause 2 of sec. 54 virtually abolishes optional registration, with all its attendant fraud and litigation (except in Bombay, the Panjáb, and Burma), and where there is a registered transfer, delivery of possession will henceforward be unnecessary, 8 Cal. 611, 612, per Garth C.J. As to the effect of failure to comply with the requirements of this section, see 7 All. 482. As to the whole section, see 8 Cal. 597.

Clauses 2 and 3 do not extend to any tract or district for the time being excluded from the Registration Act, supra, sec. 1.

³ As to the (doubtful) Hindú law in force before 1 July 1882 see 6 Mad. 405. As to the exceptions, in Bombay, to the general rule as to the necessity of possession, 6 Bom. 176-179, per Westropp C.J.

⁴ See 14 Ben. 307, 312: 12 Suth. P. C. 6: 1 Agra, p. 87.

⁵ 3 All. 12.

(1) The seller is bound—

Duties of
seller.

(a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware¹, and which the buyer could not with ordinary care discover²;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place³;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits⁴;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same⁵:

¹ In England it has been held that the seller should disclose defects of which he has the means of knowledge; otherwise he might intentionally omit to look at his deeds in order not to become aware of any defects, *Heywood v. Mallalieu*, 25 Ch. Div. 357: *Nottingham Patent Brick Co. v. Butler*, 54 L. J., Q. B. 545. As to fraudulent concealment of defects in title, see 9

Mad. 89.

² A vendor need not point out patent defects.

³ The practice is for the buyer to pay for the preparation and registration of the conveyance, and for the seller to pay for the costs of the execution.

⁴ See p. 771, (5) (b), *infra*.

⁵ 2 Agra, 199. In 2 Bom. H. C. 408,

Sec. 55 (2). provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all¹, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents². But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident³.

Rights of
seller.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the

Couch C.J. said that, in Hindú law, there appeared to be no rule entitling the purchaser of land to have a good title shown to it by the vendor, and that the intention of the parties (where both are Hindús) with regard to the title must be ascertained from the terms of their agreement. But see the case in 2 Agra, 199, where both vendor and purchaser were Hindús. See a Native covenant for title, 4 All. 357.

¹ 37 & 38 Vic. c. 78.

² *Griffiths v. Hatchard*, 1 K. & J. 17.

³ There is, at all events in Madras, another liability of the seller. In that Presidency a suit will lie against a vendor and the Collector to procure the transfer by the Revenue Authorities to the vendee's name of the registration of the property sold, 3 Mad. H. C. 134.

buyer before payment of the whole of the purchase-money, to Sec. 55 (4). a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid¹, and for interest on such amount or part.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest²; Duties of
buyer.

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto³;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller⁴;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due⁵.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof; Rights of
buyer.

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller

¹ As to the vendor's lien for unpaid purchase-money, see 3 Bom. 172: 3 Bom. H. C. 102. It is valid against volunteers, creditors, and subpurchasers with (and sometimes without) notice, Dart, 5th ed. p. 730.

² e.g. the actual or imminent death of a prior life-tenant (*Turner v. Harvey*, Jac. 169: *Ellard v. Lord Llan-daff*, 1 Ba. & B. 241). But he need not disclose any fact unknown to the

vendor (such as the existence of a mine) which increases the value of the property itself, Dart, p. 106.

³ Compare Dart, 804, 805.

⁴ e.g. the death of A on the purchase of an estate for A's life, the destruction of house-property by fire, etc.

⁵ 10 Cal. 96. This clause does not apply to execution-sales, sec. 2, cl. (d).

and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission ¹.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent ².

Sale of one of two properties subject to a common charge.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller ³, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend ⁴.

DISCHARGE OF INCUMBRANCES ON SALE.

Provision by Court for incumbrances, and sale freed therefrom.

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of court, the Court may, if it thinks fit, on the application of any party to the sale, direct ⁵ or allow payment into court,

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in

¹ *Wythes v. Lee*, 3 Drew. 396: *Torrance v. Bolton*, L. R. 14 Eq. 124, 136.

² The buyer of land, the real area of which is found to fall short of the area specified in the deed of sale, is also entitled to proportional compensation, unless it is clear that the precise area was not regarded as material, 12 Bom. H. C. 10.

³ and his representatives, Dart, 914.

⁴ 7 Suth. Civ. R. 483, 484.

⁵ In England the Court will not compel a vendor to pay money into court for the purpose of discharging an incumbrance when the result of so doing would be to inflict a great hardship upon him, *In re Great Northern*

Ry. Co. v. Sanderson, 15 Ch. Div. 788, where the incumbrance was a perpetual rentcharge, and the sum necessary to procure its discharge would have far exceeded the amount of purchase-money payable to the vendor.

Under the corresponding English section, the Court ordered that out of the purchase-money to be paid into Court, such an amount as, when invested in Government securities, the Court shall consider sufficient to provide for the annuity and costs be set aside and invested as a provision for the annuity, and that thereupon any person interested is to be at liberty to apply in chambers for an order declaring the hereditaments freed from the annuity, *Dickin v. Dickin*, 30 W. R. 887.

securities of the Government of India, the Court considers Sec. 57. will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(c) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section 'Court' means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section¹.

¹ 44 & 45 Vic. c. 41, s. 5.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

'Mort-
gage,'
'mort-
gagor,'
and 'mort-
gagee'
defined.

58. (a) A mortgage is the transfer of an interest in specific immoveable property¹ for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability².

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Simple
mortgage.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee³.

Mortgage
by condi-
tional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

¹ This covers a conditional sale (without possession) of a share in a village, 7 All. 344. As to the validity of a mortgage of future crops, see 3 Bom. H. C., A. C. J. 11. The present Act does not apply to mortgages of standing timber, growing crops or grass; see the definition of 'immoveable property,' supra, p. 747.

² such as a mortgage to secure

delivery by the mortgagor of a certain quantity of indigo on a certain day, 5 All. 238. That a bond for payment of money, with a simple covenant not to alienate the obligor's property until payment, does not constitute a mortgage, see 3 Cal. 336, and 5 Ben. 272, per Couch C.J.

³ 6 All. 553 and 7 All. 258.

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale¹.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgage². Usufructuary mortgage.

(e) Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage³. English mortgage.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered⁴ instrument signed by the mortgagor and attested by at least two witnesses. Mortgage when to be by registered instrument.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property⁵.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karáchi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property⁶, with intent to create a security thereon⁷.

¹ 1 Mad. 1. Under a similar kind of mortgage in Malabar (called *peru-arthum*), when the mortgagor redeems, the mortgagee is entitled to be paid the market value of the property at the time of redemption, 1 Mad. 57.

² Whether an usufructuary mortgage amounts to a transfer of the proprietary rights, see 7 All. 555, 557, 561.

³ As to mortgages in English form between Hindús of land situate in the

Mufassal, see 12 Cal. 614, where Pigot J. said they had always been treated by the Courts as mortgages by conditional sale.

⁴ It will be remembered that sec. 59 is to be read as supplemental to the Indian Registration Act, 1877, supra, p. 747.

⁵ This should be 'delivery of possession of the property.'

⁶ wherever situate in British India.

⁷ 11 Cal. 160: 11 Ben. 405: 7 Bom.

RIGHTS AND LIABILITIES OF MORTGAGOR.

Right of
mortgagor
to redeem.

60. At any time after the principal money has become payable¹, the mortgagor has a right, on payment or tender², at a proper time and place³, of the mortgage-money⁴, to require the mortgagee (a) to deliver the mortgage-deed⁵, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by act of the parties⁶ or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money⁷.

H. C., O. C. J. 45 : 9 Moo. I. A. 303 : 5 *ibid.* 271. As to an oral agreement by the parties to a suit that a decree be passed creating a charge on immoveable property above Rs. 100 in value, see 9 Mad. 103.

¹ As to cases in which there is a contract that the mortgagee shall enjoy the property for a fixed term, see 2 Mad. 314, 316. As to *kanom* and *ottl* mortgages, 2 Mad. 45. In Bombay the right of the mortgagor to redeem does not, in the absence of any circumstances or language indicating a contrary intention, arise any sooner than the right of the mortgagee to foreclose, 2 Bom. H. C. 225 : 5 Bom. 22. But this does not apply to cases under the Dekkhan Agriculturists Relief Act (XVII of 1879), 6 Bom. 734.

² *Supra*, p. 504.

³ Fisher, *Law of Mortgage*, 4th ed., § 1229, 1230.

⁴ i.e. the whole of the mortgage

money, 3 *Suth. Misc. App.* 4. Receipts for such payments must be registered, or they will not be admissible in evidence, 6 All. 335.

⁵ As to the mortgagee's lien on the mortgage deed, 5 Bom. H. C., O. C. J. 152.

⁶ It requires a clear expression of intention to deprive a mortgagor of his right to redeem, 3 Mad. 233, and in 7 Mad. H. C. 395 the Court thought the right to redeem was 'so much an essential as not to be variable by agreement.' As to the rule 'once a mortgage always a mortgage,' see 1 Bom. H. C. 199 : 2 Bom. 231, 243.

⁷ This clause should run thus :— 'Notwithstanding anything hereinbefore contained, the mortgagee shall be entitled to reasonable notice before payment or tender of the mortgage money, (a) when no time for payment of the principal money has been fixed by the parties, and (b) when such a time has been fixed by the parties,

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage¹, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor².

Redemption of portion of mortgaged property.

61. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem³.

Right to redeem one of two properties separately mortgaged.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

62. In the case of a usufructuary mortgage, the mortgagor has a right⁴ to recover possession of the property—

Right of usufructuary mortgagor to recover possession.

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid ;

(b) where the mortgagee is authorized to pay himself from

but has been allowed to pass without payment.¹

¹ The mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together—especially where the mortgaged property is a house, 2 Mad. 223 : 8 Bom. 488, 489. That the right to redeem is an indivisible jural object, see 7 Bom. 473, per West J., and that the rule against partial redemption is unaffected by the sale of part of the mortgaged property for arrears of revenue, see Suth. 1864, Civ. R. 217, per Morgan J.

² Then the joint character of the mortgage is destroyed and (a) the mortgagee or mortgagees may redeem the property so acquired by payment of a proportionate part of the amount remaining due, 13 Moore I. A. 404 : (b) each of the mortgagors may redeem his own share, and (with the

mortgagees' consent) the share of any other mortgagor, 2 All. 565. But the fact that one of several mortgagees has acquired the right to redeem the share of one of the mortgagors does not entitle another of the mortgagors to redeem his own share, 5 All. 276, following 5 N. W. P. 148. He is not entitled to redeem unless he discharges the whole mortgage debt, and he will then be entitled to sue for contribution the purchaser of the other portion of the right to redeem, *ibid.* 150.

³ Secus in Bombay, 6 Bom. H. C., A. C. J. 90, where the Court applied to a Muhammadan mortgage the rule established in England by *Shuttleworth v. Laycock*, 1 Vern. 245, etc., but now abolished by the Conveyancing Act, 1881, sec. 17.

⁴ in addition to his right to redeem under sec. 60.

such rents and profits the interest of the principal money,—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in court as hereinafter provided.

Accession to mortgaged property.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession ¹.

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it ². If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended ³.

¹ 10 Bom. H. C. 369; 11 Bom. H. C. 32; 1 Agra, 1866, p. 281.

² Thus when a *patni* tenure has been granted out of a *zamindari* and the *zamindari* is mortgaged, if the mortgagee in possession buys the *patni*, the mortgagor on redemption, if he desires to take the *patni*, must pay its price. So where a *talukdar* mortgages portion of his *taluk* in respect of which certain subordinate *birt* tenures existed, and the mortgagee buys these tenures, the mortgagor on redeeming and desiring to take these tenures must reimburse the mortgagee their price, though the mortgagee has treated them

as merged in the *taluk*, 5 Cal. 198.

³ The Act does not provide for the case of a mortgagor retaining possession after expiration of the time allowed him for payment of the mortgage-money. His position is that of a person acquainted with the imperfection of his title, and one entirely of his own choosing. As to emblements, it falls therefore under a different principle from that of a tenant at will cultivating on a reasonable expectation of reaping what he has sown, or of a holder whose right is put an end to by a wholly uncertain event, 2 Bom. 672, per West J.

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease¹. Renewal of mortgaged lease.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee, Implied contracts by mortgagor.

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same²;

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto³;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts⁴;

(e) and, where the mortgage is a second or subsequent

¹ *Rakestraw v. Brewer*, 2 P. W. 511: 30 5 Cal. 211: Fisher, § 464. The reason is because the new lease 'comes from the same root and is subject to the same equity.' So where the mortgaged property is an undivided share in land, and under a *batwára* or revenue partition, other lands are allotted to the mortgagor or his assign in lieu of such share, the mortgage may be enforced against the

lands so allotted. But lands allotted in severalty by the *batwára* to the co-sharers of the mortgagor are not subject to the mortgage, L. R. 1 I. A. 106.

² 2 Agra, 199.

³ S. D. A. 1853, p. 575: 1857, p. 1195.

⁴ Compare the form in Davidson's *Precedents*, 4th ed., vol. ii. part 2, pp. 420, 421.

incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Waste by
mortgagor
in posses-
sion.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto¹, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage².

RIGHTS AND LIABILITIES OF MORTGAGEE.

Right to
foreclosure
or sale.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid³ or deposited as hereinafter provided, a right to obtain from the Court⁴ an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold⁵.

¹ See *Dugdale v. Robertson*, 3 Jur., N. S. 687 (working mines): *Ackroyd v. Mitchell*, 3 L. T., N. S. 236 (removing fixtures): *Usborne v. Usborne*, 1 Dickens, 75 (felling timber-trees).

² *Lewin on Trusts*, 8th ed., p. 325.

³ or tendered?

⁴ having jurisdiction to hear a suit for foreclosure or sale of the property.

⁵ 2 Mad. H. C. 289; 2 N. W. P. 1870, p. 311. Right to sale, 9 Bom. 12.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure¹.

Nothing in this section shall be deemed—

(a) to authorize a simple mortgagee as such to institute a suit for foreclosure², or an usufructuary mortgagee as such to institute a suit for foreclosure or sale³, or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure⁴; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale⁵; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

Right to
sue for
mortgage-
money.

(a) where the mortgagor binds himself to repay the same:

(b) where the mortgagee is deprived of the whole or part⁶ of his security by or in consequence of the wrongful act or default of the mortgagor⁷:

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person⁸.

¹ That a mortgagee is, as a general rule, entitled to the costs of enforcing his security, see 3 Bom. 202.

² N. W. P. 1869, p. 184.

³ N. W. P. 1875, p. 55.

⁴ Fisher, 4th ed., § 793.

⁵ Fisher, 4th ed., §§ 390, 502. The remedy of such mortgagees will be to obtain, under the Code of Civil Procedure, c. xxxix, a receiver of the

profits of the undertaking.

⁶ Formerly when the mortgagee was deprived of only part of his security he could only recover a proportionate amount of the mortgage-money, 25 Suth. Civ. R. 7.

⁷ Act XXXIII of 1871, sec. 46. The words 'or any other person' are significantly absent, 6 All. 301.

⁸ 4 Moo. I. A. 444: Marshall,

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed¹, or the security is rendered insufficient as defined in section 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money².

Power of
sale when
valid.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases and in no others³ (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette⁴;

(b) where the mortgage is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karáchi or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the

209: 6 All. 298. As to the previous rule, 9 Cal. 236.

¹ by diluvion, force, or other *vis maior*.

² The words 'in the absence of a contract to the contrary' seem omitted *per incuriam* from this clause. Were they present, the clause would accord (except as to the power to require other security) with the Hindú, English, and Roman laws on the subject, see 7 Bom. H. C., A. C. J. 116.

³ The words 'and in no others' were inserted by Act III of 1885, sec. 5. As to the validity of a sale made in the Bombay Mufassal by a Hindú under a power of sale contained in a mortgage-deed in the English form, see 2 Bom. 1, 252. Such a power is not suspended by a redemption-suit, 2 Bom. 255.

⁴ The words 'or a member . . . Gazette' were added by Act III of 1885, section 5.

principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due¹.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections 6 to 19² (both inclusive) of the Trustees and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Buddhist, or a member of any other race, sect, tribe, or class from time to time

¹ As to the exercise of a mortgagee's power of sale, see 5 Ben. 460, note. As to such powers in the Bombay Mufassal, see 2 Bom. 1, 252. As to the title acquired by a mortgagee who

purchases under the power with the mortgagor's consent, 10 Bom. 49.

² See these sections, *infra*, pp. 817-820.

specified in this behalf by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette¹.

Accession
to mort-
gaged
property.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession².

Illustrations.

(a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(b) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security, *B* is entitled to the house as well as the plot³.

Renewal
of mort-
gaged
lease.

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease⁴.

Rights of
mortgagee
in posses-
sion.

72. When, during the continuance of the mortgage, the mortgagee takes possession⁵ of the mortgaged property, he may spend such money as is necessary—

(a) for the due management of the property and the collection of the rents and profits thereof⁶;

(b) for its preservation from destruction, forfeiture, or sale⁷;

(c) for supporting the mortgagor's title to the property⁸;

(d) for making his own title thereto good against the mortgagor; and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease⁹;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest

¹ The words 'or a member . . . Gazette' were inserted by Act III of 1885, sec. 5.

² 5 Cal. 210; 11 Bom. H. C. 32; and see *Doe v. Pott*, 2 Doug. 710.

³ So where *A* discharges a prior mortgage, a puisne mortgagee *B* will have the benefit of the security discharged from the prior incumbrance, *Ex p. Bisdee*, 1 M. D. & De G. 333, and see *Fisher*, § 462.

⁴ *Moody v. Matthews*, 7 Ves. 174.

⁵ As to possession, see above, p. 56. Appointing a clerk of his own to receive the annual produce of a mortgaged village is a 'taking possession,' 2 Moo. I. A. 487.

⁶ 1 Suth. 133; 9 Suth. Civ. R. 488; 1 Bom. H. C. 199, 203; 5 Bom. H. C., A. C. J. 109, 116.

⁷ 2 Agra, 187; 11 Moo. I. A. 241.

⁸ 1 Bom. H. C. 199; 9 Bom. 437.

⁹ *Fisher*, 5th ed. § 1457.

payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum¹.

Where the property is by its nature insurable, the mortgagee² may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate³. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured⁴.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure⁵.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereof of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part⁶.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior

Charge on
proceeds of
revenue-
sale.

Right of
subsequent
mortgagee
to pay off
prior mort-
gagee.

¹ 2 Bom. H. C. 214. Where one portion of a mortgaged house was accidentally burnt, and another fell down, and both were rebuilt by the mortgagee at a cost amounting to more than double the mortgage-money, the mortgagor was held not entitled to redeem unless upon payment of the sum so expended, 5 Bom. H. C., A. C. J. 109, and see *ibid.* 116. A mortgagee will be allowed the expense of making boundaries in connexion with the revenue-survey, 2 Bom. H. C. 232.

² who has taken possession.

³ 23 & 24 Vic. c. 145.

⁴ Cf. 44 & 45 Vic. c. 41, s. 23, and Fisher, § 1459.

⁵ As to joint-insurances effected by mortgagor and mortgagee, see *Rogers*

v. *Grazebrook*, 12 Sim. 557.

The Act says nothing expressly as to the power of the mortgagee to assign his rights to a third person. This of course he may do (sec. 6), but without prejudice to the rights of the mortgagor. He may put another into his own position, but he cannot create a title in a third person distinct from his own title; and in a suit by the mortgagor for redemption, where an assignment has been made without the knowledge of the mortgagor, the assignee is bound by the state of the accounts between the mortgagor and mortgagee, though he may have paid more, 2 Mad. 212, 214.

⁶ 1 Suth. 270: 16 Suth. Civ. R. 222.

mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount¹; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Rights of
means
mortgagee
against
prior
and subse-
quent mort-
gagees.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor².

Liabilities
of mort-
gagee in
possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(a) he must manage the property as a person of ordinary prudence³ would manage it if it were his own⁴;

(b) he must use his best endeavours to collect the rents and profits thereof⁵;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue⁶, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold⁷;

¹ This does not empower a prior mortgagee to prohibit either the mortgagor from dealing with the right to redeem, or a subsequent mortgagee from enforcing his security, subject to the rights created by the prior mortgage, 7 All. 574.

² Where a prior mortgagee buys the right to redeem see 6 Bom. 404; 4 Cal. 821. As to giving successive periods of redemption where in a foreclosure-suit there are subsequent mortgagees entitled to redeem, see *Platt v. Mendel*, 54 L. J., Chan. 1145.

³ Contract Act, sec. 151: Fisher, § 1462.

⁴ Act IX of 1872, sec. 151: 8 Chan. Div. 427. A mortgagee in possession of cultivable land must, e.g. cultivate the ordinary crop which it is capable

of yielding, 2 Bom. H. C., A. C. J. 212. Where a mortgagee in possession, instead of letting the property to ryots, cultivated it himself, he was held liable to account only for such profits as would have been made had he or the mortgagor let the land, 7 Suth. Civ. R. 244. As to the duty of the mortgagee of a fractional share of an estate held in joint tenancy, see 3 Suth. Civ. R. 150.

⁵ 7 N. W. P. (1875), 100: Fisher, § 1430.

⁶ The word 'and' has been accidentally dropped here: the words 'accruing due in respect thereof during such possession' are intended to apply to the Government-revenue.

⁷ 6 All. 309. The last words provide for patni tenures and saleable

(*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal money¹;

(*e*) he must not commit any act which is destructive or permanently injurious to the property²;

(*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money³;

(*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee⁴, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported⁵.

(*h*) his receipts from the mortgaged property⁶, or, where such property is personally occupied by him, a fair occupation-rent⁷ in respect thereof, shall, after deducting the expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money⁸ and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money⁹; the surplus, if any, shall be paid to the mortgagor¹⁰;

undertenures. Where the mortgagee of leaseholds is put into possession under circumstances amounting to an assignment or transfer of the leasehold interest, he is liable, as a rule, to pay the rent, 10 Cal. 444.

¹ 9 Suth. 488 : 9 Bom. 589 : 4 Y. & C. Appx. 507 : Fisher, § 1464.

² If, for example, he opens (without special authority) mines or quarries, he will be charged with his receipts and disallowed his expenses. The Act makes no exception where the security is insufficient; see Fisher, § 1463.

³ 7 N. W. P. 436 : 9 N. W. P. 1 : Act I of 1877, sec. 54 : 44 & 45 Vic. c. 41.

⁴ As to these accounts see Suth. 1864, Civ. R. 177, 179. When the mortgagee is in possession as such and also as lessee under a lease, see 6 Moo. I. A. 393, 422, 423.

⁵ 2 Ben. P. C. 55 : 5 Suth. 53, 271.

⁶ A mortgagee in possession is liable to account for the profits arising from trees planted by himself on the mortgagee's land, 12 Bom. H. C. 88.

⁷ 12 Bom. H. C. 88.

⁸ This should be 'principal-money.'

⁹ 5 Bom. A. C. J. 196 : 12 Bom. 88 : 10 Ben. 386 : N. W. P. 1866, p. 132, *ibid.* 1868, p. 153. When he cultivates, see 7 Suth. 244.

¹⁰ 2 Moo. I. A. 1 : 6 All. 309.

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court, as the case may be.

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree¹ made under this chapter, be debited with the loss, if any, occasioned by such failure.

Receipts in lieu of interest.

77. Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal².

PRIORITY.

Postponement of prior mortgagee.

78. Where, through the fraud³, misrepresentation⁴ or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee⁵.

Mortgage to secure uncertain amount when maximum is expressed.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mort-

¹ whether for foreclosure, sale, or redemption (sec. 92). Where the receipts of a mortgagee in possession are more than sufficient to cover the interest the annual surplus will be applied in reduction of the mortgage money. This is called 'taking the accounts with rests'; and in India (though not in England, Fisher, 4th ed. § 1475) it is of course to direct them, 6 All. 311.

² Sev. (1863), 333 : see 10 Moo. I.

A. 340. The Act is silent as to the mortgagee's lien on the title-deeds. As to this see 5 Bom. H. C., O. C. J. 152.

³ Contract Act, sec. 17.

⁴ Ibid. sec. 18.

⁵ Compare the Evidence Act, sec. 115, and see 4 Mad. H. C. 373 : 2 Moo. I. A. 487 : 11 Suth. 286 : 8 Bom. A. C. J. 50, 55 : 11 Bom. H. C. 41. As to what 'gross neglect' will give priority, see *Manners v. Mew*, 54 L. J., Chan. 909.

gage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultánpur to his bankers, *B & Co.*, to secure the balance of his account with them to the extent of Rs. 10,000. *A* then mortgages Sultánpur to *C*, to secure Rs. 10,000, *C* having notice of the mortgage to *B & Co.*, and *C* gives notice to *B & Co.* of the second mortgage. At the date of the second mortgage, the balance due to *B & Co.* does not exceed Rs. 5,000. *B & Co.* subsequently advance to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. *B & Co.* are entitled, to the extent of Rs. 10,000, to priority over *C*.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security¹. And, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance. Tacking abolished.

MARSHALLING AND CONTRIBUTION.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property². Marshalling securities.

¹ 7 Bom. 529: 7 All. 573: 2 Ben. Appx. 45: 5 Ben. 463. This was the law in England under the Vendor and Purchaser Act, 1874, sec. 7; but it was repealed by the Land Transfer Act, 1875, sec. 129. As to the present law in England see Fisher, § 933. As to tacking under

the old law in the N. W. Provinces, see 4 All. 85, 90.

² Suth. 1864, Civ. R. p. 374: 1 Suth. 353: 7 Suth. Civ. R. 483: see 6 Cal. 142. A similar equity is possessed by a *bond fide* purchaser for value without notice of a portion of property the whole of which was subject to a prior

Contribution to mortgage-debt.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage¹.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the second mortgagee².

DEPOSIT IN COURT.

Power to deposit in court money due on mortgage.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred³, the mortgagor, or any other person entitled to institute such suit, may deposit⁴, in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints⁵) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed if then in his possession or

incumbrance, 7 All. 711, 713. But when the owner of certain properties mortgages it to A and afterwards sells a portion of the mortgaged property to B, it is not incumbent on A, in suing to enforce his mortgage, to proceed first against the unsold portion, 11 Cal. 258.

¹ Fisher, § 1101.

² *Ib.*, § 1102.

³ by act of parties, by order of

Court, or by the Limitation Act.

⁴ That a deposit may be valid, though accompanied by a protest against the validity of the mortgage and a threat to sue for cancellation of the mortgage-deed, see 3 *Suth. Civ. R.* 185.

⁵ See the Code of Civil Procedure, secs. 51, 52, 53 (c), 435.

power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

84. When the mortgagor or such other person as aforesaid has tendered, or deposited in court under section 83, the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court, as the case may be¹. Cessation of interest.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

SUITS FOR FORECLOSURE, SALE OR REDEMPTION.

85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage²: Provided that the plaintiff has notice of such interest³. Parties to suits for foreclosure, sale and redemption.

FORECLOSURE AND SALE.

86. In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, Decree in foreclosure-suit.

and ordering that, upon the defendant paying to the plaintiff or into court the amount so due, on a day within six months from the date of declaring in court the amount so due,

¹ Fisher, § 1534: 8 All. 506.

² See 14 Moo. I. A. 101: 21 Suth. 428 (several mortgagors): 5 Bom. H. C., O. C. J. 76 (legal representative of deceased mortgagee): 8 Ben. 104 (purchaser from mortgagor): claimants of right of redemption, 4 N. W. P. 1868, p. 144. As to fore-

closure-suits, 3 Cal. 397, and as to redemption-suits, 9 Bom. 131.

³ As to the consequences of not joining a second mortgagee in a suit by the first mortgagee for a sale, see 6 Bom. 519: 8 Cal. 79. The decision in 4 All. 518 seems wrong. Compare 5 Mad. 184 and 8 Ben. 104.

to be fixed by the Court¹, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

Procedure
in case of
payment
of amount
due.

87. If payment is made of such amount and of such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put into possession of the mortgaged property.

Order
absolute
for fore-
closure.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Power to
enlarge
time.

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment².

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, schedule IV, No. 129, for the words 'Final decree,' the words 'Decree absolute' shall be substituted.

Decree for
sale.

88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold,

¹ Application for execution must not be made before the time so fixed, 7 All. 194.

² But it cannot open a foreclosure

when once the order absolute has passed. Otherwise in England, see Fisher, §§ 1621-1624.

and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

Power to decree sale in foreclosure-suit.

89. If in any case under section 88 the defendant pays to the plaintiff or into court on the day fixed as aforesaid ¹ the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished ².

Procedure when defendant pays amount due.

Order absolute for sale.

90. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum ³.

Recovery of balance due on mortgage.

¹ If the Court is closed on the day so fixed for payment into court, it will be enough if the defendant deposits the money on the day that the Court re-opens, 8 Suth. Civ. R. 223.

² The defendant, however, may still pay off the amount of his debt

at any time before the property is sold.

³ The mortgagee need not institute a new suit for the balance. See Kent, Comm. iv. 182, as to the practice in England, Ireland, and the United States.

REDEMPTION.

Who may
sue for re-
demption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property¹;

(b) any person having any interest in, or charge upon, the right to redeem the property²;

(c) any surety for the payment of the mortgage-debt or any part thereof³;

(d) the guardian of the property of a minor mortgagor on behalf of such minor⁴;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot⁵;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property⁶;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property⁷.

Decree in
redemption-suit.

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

that an account be taken of what will be due to the defendant for the mortgage-money⁸ and for his costs of the

¹ Would this include the Crown when a mortgaged estate vests in it by forfeiture? Fisher, § 1191.

² 3 *Suth. Civ. R.* 230: 6 *ibid.* 230, 231. That a purchaser of the right to redeem may sue for redemption although the mortgagor has previously obtained a redemption-decree, which has not been executed for three years, see 8 *Mad.* 478 dissenting from 7 *Bom.* 467. That the purchaser of the right to redeem part of the mortgaged property is entitled to redeem the whole if the mortgagee insists on his right to have it so redeemed, see 2 *Mad.* 223: that he is entitled to redeem that part on paying a proportionate part of the mortgage-debt, 13 *Moo. I. A.* 404. Where the owner of a part of the right to redeem redeems the mortgaged

property, he has a lien on the share of the co-owner for a proportional contribution to the sum expended in redemption, and this lien is as capable of transfer as the ownership, 8 *Bom.* 500.

³ Fisher, § 1178.

⁴ Fisher, § 1189.

⁵ Fisher, § 1190.

⁶ Fisher, § 1198. It had been held in 1880 that an attaching-creditor is not, as such, entitled to redeem a mortgage subsisting prior to his attachment, 6 *Cal.* 663.

⁷ Fisher, § 1200. If a party (whose title is to some extent imperfect) seeking to redeem is at the hearing of his cause able to prove a perfect title, he may have a decree, 6 *Bom.* 142, 143.

⁸ In taking the account, it lies upon

suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into court the amount so due on a day within six months from the date of declaring in court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

93. If payment is made of such amount and of such subsequent costs as are mentioned in section 94, the plaintiff shall, if necessary, be put into possession of the mortgaged property. In case of redemption, possession.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold. In default of foreclosure or sale.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold,

the mortgagee to prove what is due from the plaintiff in respect of principal and interest, 6 Bom. 669. That

the mortgagee is entitled to credit for reasonable costs of repairs, see *supra*, sec. 76, clause (d), and 4 Bom. 589.

and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished:

Power to
enlarge
time.

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section 92 for payment to the defendant.

Costs of
mortgagee
subsequent
to decree.

94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs¹, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Charge of
one of
several
co-mort-
gagors who
redeems.

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession².

SALE OF PROPERTY SUBJECT TO PRIOR MORTGAGE.

Sale of
property
subject
to prior
mortgage.

96. If any property the sale of which is directed under this chapter is subject to a prior mortgage, the court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold³.

Applica-
tion of
proceeds.

97. Such proceeds shall be brought into court and applied as follows:—

¹ As for example, where he has been guilty of gross misconduct or oppression, or has caused expenses to be incurred which cannot justly be thrown on the mortgagor, Fisher, §§ 1545-1550.

² He might also, apparently, sue the

other mortgagors for contribution, 1 All. 455.

³ The Act therefore contemplates the enforcement of subsequent mortgages without paying off the prior encumbrances, 7 All. 574, per Mahmud J.

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in section 96 shall be deemed to affect the powers conferred by section 57.

ANOMALOUS MORTGAGES.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage¹.

Mortgage not described in section 58, clauses (b), (c), d) and (e).

ATTACHMENT OF MORTGAGED PROPERTY.

99. Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43².

Attachment of mortgaged property.

CHARGES.

100. Where immoveable property of one person is by act

Charges.

¹ Cf. Bom. Reg. V of 1827, sec. 15.

² As to the object of sec. 99 see *supra*, p. 733. It was never intended

to apply to a decree already obtained declaring a lien over, and authorizing a sale of, the mortgaged property, 12 Cal. 436.

of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

Ex-
tin-
guishment
of charges.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished¹, unless he declares, by express words or necessary implication², that it shall continue to subsist, or such continuance would be for his benefit³.

NOTICE AND TENDER.

Service or
tender on
or to agent.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district⁴ in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may

¹ L. R., 10 I. A. 62.

² As to 'necessary implication' see 6 Bom. 404, 561: 3 All. 682: 4 All. 525.

³ 7 Mad. H. C. 229 (but see 4 Mad. 213): 2 All. 826: 7 All. 571: 6 Bom. 404. That when an incumbrancer becomes owner for a price out of which his own incumbrance is discharged, his incumbrance *prima facie* merges as against the others of whose claims he had notice,

see *Toulmin v. Steere*, 3 Mer. 210, and *Fisher*, § 1253. That where he shows an intention of doing so, he may stand in the first mortgagee's place against the next incumbrancer, see *Watts v. Symes*, 1 De G. M. & G. 240. As to the case when the mortgagee of plot A takes a mortgage of plots A and B, for the same debt, see 3 Cal. 307.

⁴ See the Code of Civil Procedure, sec. 2.

apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of court by, any person incompetent to contract, such notice may be served¹, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Notice
&c. to or
by person
incompe-
tent to
contract.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter².

Power to
make rules.

¹ The words 'on or by' have dropped out.

² Rules made under this section by the High Court of Bengal, dated 31 July, 1884, are published in the Cal-

cutta Gazette for Aug. 6, 1884, Part I. p. 834, and are reprinted in Macpherson's *Law of Mortgages*, 7th ed., pp. 733-7.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

**Lease
defined.**

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

**Lessor,
lessee,
premium
and rent
defined.**

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

**Duration
of certain
leases in
absence of
contract
or local
usage.**

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy¹; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month², terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy³.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence⁴,

¹ So generally throughout the Bombay Presidency, 7 Bom. H. C., A. C. J. 113: 4 Bom. H. C., A. C. J. 127: 6 ibid. 31. And in Bengal, 4 Ben. Appx. 86: 2 Cal. 146. And in the N. W. Provinces, 5 N. W. P. 1873, p. 9.

² See 12 Ben. 263 as to the usage in Calcutta.

³ 7 All. 598: S. C. on appeal, ibid. 899. There must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation, be treated as a trespasser, ibid. 902, per Straight J.

⁴ Compare the explanations as to residence in the Civ. Proc. Code, s. 17.

or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property¹.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered² instrument. Leases how made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

108. In the absence of a contract or local usage³ to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased⁴:— Rights and liabilities of lessor and lessee.

A.—RIGHTS AND LIABILITIES OF THE LESSOR.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover⁵:

(b) the lessor is bound on the lessee's request to put him in possession of the property⁶:

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested⁷.

¹ As to proof of service of notice to quit, 7 Bom. 474.

² Supra, p. 747, sec. 3.

³ For example, the usage entitling Hindú tenants of land in Calcutta to remove tiled huts, 14 Ben. 201.

⁴ The Act is silent as to the lessor's rights against strangers. Can he, for instance, sue for trespass on the property, when the wrongful act does not import damage to his reversionary interest? The Madras High Court seems to think that he generally can, on the ground that many of the Indian tenures are in the nature of a partnership in

which the landlord shares the crop with the cultivators, 2 Mad. 232.

⁵ 3 Ben. A. C. J. 277, where the lessor of a thatched bungalow did not disclose to the lessee that one of its chimneys was thatched over. As to concealing defects in title, see *Mostyn v. West*, 1 C. P. D. 143.

⁶ i. e. the whole of the property comprised in the lease. See 6 Ben. Appx. 44. If the lessor fails to do so, the lessee may recover damages, 7 Suth. Civ. R. 22, col. 2.

⁷ Woodfall, 11th ed., 146, 147.

B.—RIGHTS AND LIABILITIES OF THE LESSEE.

(d) If during the continuance of the lease any accession¹ is made to the property, such accession (subject to the law relating to alluvion² for the time being in force) shall be deemed to be comprised in the lease³ :

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice⁴, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent⁵, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent⁵, or otherwise recover it from the lessor⁶ :

(h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth⁷ : provided he leaves the property in the state in which he received it :

(i) when a lease of uncertain duration determines⁸ by any means except the fault of the lessee, he or his legal representative is entitled to all the crops⁹ planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them⁹ :

¹ 8 Ben. 73 : 5 Cal. L. R. 33. As to trees planted by the lessee, 2 All. 896.

² See Ben. Reg. XI of 1825, Bom. Act V of 1879, secs. 63, 64, and other local enactments.

³ As to enhancing in such case the lessee's rent, see (in Bengal) 8 Cal. 706.

⁴ Supra, p. 747, sec. 3. See Woodfall, 13th ed., 595.

⁵ i.e. the whole rent then due, not merely the rent for the current year.

⁶ *Payne v. Burridge*, 12 M. & W. 727.

⁷ See sec. 3, supra, p. 747 : Ben. F. B. Rulings, 595 : 8 Ben. 237 : 14 Ben. 201, 205 : Canadian Code, 3. 1640. For the Hindú law as to the removal of buildings erected by tenants, see 5 Cal. 691. As to the removal of trees, 2 All. 896.

⁸ See infra, sec. III.

⁹ As to the right to emblements (i.e. vegetable productions of the soil which are annually produced by the labour of the cultivator), 2 Bom. 670.

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease¹ the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it². The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee:

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest³:

(l) the lessee is bound to pay or tender⁴, at the proper time and place, the premium or rent to the lessor or his agent⁵ in this behalf⁶:

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force⁷, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof⁸ and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made

¹ Where the lease contains a stipulation against subletting without the lessor's consent, the saving words at the beginning of this section will apply, and the lessor may either sue for damages for breach of the stipulation, or for an injunction to restrain the subletting, 7 Bom. H. C., A. C. J. 69.

In England neither a tenant at will nor a tenant on sufferance can demise; except so far as to create a tenancy by estoppel as between him

and his lessee.

² So held 5 Mad. H. C. 120, 227: 7 Ben. 152: N. W. P. 1875, p. 181: 16 Suth. Civ. R. 112.

³ *Ellard v. Lord Llandaff*, 1 Ball & B. 241.

⁴ unconditionally.

⁵ express or implied.

⁶ As to remitting rent through the post, see Woodfall, 13th ed., p. 397.

⁷ 23 Suth. Civ. R. 34, 35.

⁸ *Hunt v. Dowman*, 2 Croke, 478.

upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor¹:

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell² timber, pull down or damage buildings, work mines or quarries not open when the lease was granted³, or commit any other act which is destructive or permanently injurious thereto⁴:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes⁵:

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property⁶.

Rights of
lessor's
transferee.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it⁷; but the lessor shall not, by reason

¹ A tenant is bound to keep distinct from his own land during the tenancy, and to leave clearly distinct at the end of the tenancy, the lessor's land, 6 Mad. 263, following *Atty. Gen. v. Fullerton*, 2 V. & B. 264. An encroachment made by a tenant upon land adjoining to or even in the neighbourhood of his holding, is (by English law) presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord. And this rule applies to all land so encroached upon, whether the landlord has any interest in it or not. If during the tenancy the tenant encroaches upon the land of a third person, and holds it with his own tenure until the tenancy expires, he is considered to have made the encroachment not for his own benefit but for that of his landlord, and if he acquired a title against the third person by adverse possession, he acquired it for his landlord and not for himself. This doctrine seems to have been adopted in India. By English law, too, if it is distinctly proved that the tenant made the encroachment

adversely to his landlord an adverse possession for twelve years might give the tenant a title by limitation; and this would probably be so in India, 10 Cal. 821-822, per Garth C.J. More as to encroachments, Woodfall, 742. As to the estoppel of a tenant, see the Evidence Act I of 1872, sec. 116.

² or otherwise destroy.

³ If they were open before, their contents have become 'products' of the property.

⁴ 5 Ben. 401, 416: 8 Ben. Appx. 70: 11 Ben. Appx. 41: 15 Suth. Civ. R. 360: 17 *ibid.* 416: 23 *ibid.* 298, and see 8 Chan. Div. 526.

⁵ 8 Ben. 242, Co. Litt. 53 a, and see 14 & 15 Vic. c. 25, sec. 3.

⁶ even where a subtenant wrongfully holds over and refuses to quit, *Harding v. Crethorn*, 1 Esp. 57. The lessor may recover from the lessee as special damage the cost of ejecting the subtenant, *Henderson v. Squire*, L. R. 4 Q. B. 170.

⁷ 24 Suth. Civ. R. 68: Woodfall, 11th ed., 147.

only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee ¹.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased ².

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease. Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences. Duration of lease for a year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option ³. Option to determine lease.

111. A lease of immoveable property determines—

- (a) by efflux of the time limited thereby ⁴;
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event ⁵;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only

Determination of lease.

¹ Act XI of 1855, sec. 1: 4 Anne, c. 16, sec. 10.

² See Code of Civil Procedure, secs. 16, 19, 20.

³ *Dann v. Spurrier*, 3 Bos. & P. 399, where the lease was for '7, 14, or 21 years.'

⁴ 3 Moo. I. A. 261: 16 Suth. Civ. R. 147.

⁵ A lease of land whereby the lessee is empowered to hold the land as he pleases determines on his death, 4 Bom. 424.

to, the happening of any event—by the happening of such event¹:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right²:

(e) by express surrender; that is to say, in case the lessee³ yields up his interest under the lease to the lessor⁴, by mutual agreement between them⁵:

(f) by implied surrender⁶:

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void⁷; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself⁸; and in either case the lessor or his transferee does some act showing his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other⁹.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

Waiver of forfeiture.

112. A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture,

¹ Marshall, 166, where the lease was granted by a childless Hindú widow.

² 3 C. L. R. 159. More as to merger, Woodfall, p. 308.

³ being in possession and competent to contract.

⁴ being competent to contract.

⁵ As to surrender by one of several joint lessees, see 9 Suth. 147, 149; Woodfall, 298. No writing is required.

⁶ as where the lessee accepts a valid new lease from the reversioner to begin either presently or at some time during the continuance of the former lease.

⁷ Marshall, 250: as to relief against forfeiture for non-payment of rent, see below, sec. 114.

⁸ 6 Cal. 436, and see 18 Suth. Civ. R. 465: 25 *ibid.* 147. Where the

plaintiff sued in ejectment and the defendant set up a right as a permanent tenant, this was held to be a repudiation of the lessor's title and to absolve him from the obligation which would have devolved on him, if the defendant had set up a tenancy from year to year, of giving the defendant a notice to quit, 8 Bom. 228, following *Vivian v. Moat*, 16 Ch. Div. 730.

⁹ 23 Suth. Civ. R. 238, 271. The notice ought to be clear and unambiguous, 11 Cal. 538; and it must be reasonable, and the reasonableness must be decided according to the circumstances of each case and the local custom. The notice need not expire at the end of the year, 9 Cal. 48, per Field J. As to the notice to which a tenant from year to year is entitled, see 6 Bom. 67, 70: 7 Mad. 374: 6 Bom. H. C., A. C. J. 31.

or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting¹:

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver². Waiver of notice to quit.

113. A notice given under section 111, clause (4), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting³.

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived⁴.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived⁴.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee⁵, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred⁶. Relief against forfeiture for non-payment of rent.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, Effect of surrender and forfeiture on under-leases.

¹ such as an absolute and unqualified demand of such rent, or the institution of a suit for it. See *Suth. F. B.* (1862), 10: *S. C. Marshall*, 25.

² 2 *Bom. H. C.* 66, 70.

³ So if *A* distrains for such rent.

⁴ This assumes that the second notice is sufficient.

⁵ Such a suit must be brought within twelve years after the determination, *Act XV of 1877*, art. 139.

⁶ See 6 *Mad.* 330: 2 *Bom. H. C.* 66, 70: *Great Eastern Hotel Co. v. Collector of Allahabad*, 2 *Agra* (Ex. O. C. J.), 1: 8 *Suth.* 225, col. 1, per *Peacock C.J.*

unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor¹.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

Effect of holding over.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106².

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C*'s lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

Exemption of leases for agricultural purposes.

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

¹ See N. W. P. 1871, p. 63.

² Where on the expiration of a lease the lessee is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding, 3 Bom. H. C., A. C. J. 27, 30. Thus where *A* lets a garden to *B* for two years, *B* having under the lease a right to remove from the garden certain guava

trees at the end of the term, and the lease expires, but *B* continues in possession as a yearly tenant, he may remove the trees at the end of the year next after the expiration of the two years' lease. See as to the law before 1882, the case just referred to, and in Bengal, 12 Ben. 263; N. W. P. 1870, p. 204; 7 Suth. Civ. R. 152; 16 ibid. 185; 22 ibid. 394, 548; 25 ibid. 234.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange' ^{1.} 'Exchange' defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale ^{2.}

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him ^{3.} Right of party deprived of thing received in exchange.

120. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes ^{4.} Rights and liabilities of parties.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him ^{5.} Exchange of money.

¹ This Act does not contemplate the receipt of money for owelty of exchange; as to this see 1 Mad. H. C. 101.

² See sec. 54, *supra*, p. 768.

³ Code Civil, art. 1705: Burge, Comm. ii. 672.

⁴ See sec. 55, *supra*, pp. 768-772; and where the things exchanged are moveable, the Contract Act, secs. 37-55; 73-75; 93; 94; 97-107, etc.

⁵ and by Muhammadan law, the

delivery must be immediate, 1 Morl. Dig. 105, § 5.

Sec. 121 is taken from the Draft New York Civil Code, § 906; but the cases there cited do not support the proposition; and in *La Neuville v. Nourse*, 3 Campb. 351, Lord Ellenborough thought there was no implied warranty upon an exchange of goods.

CHAPTER VII.

OF GIFTS ¹.

'Gift' defined.

122. 'Gift' is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person ², called the donor, to another, called the donee, and accepted by or on behalf of the donee ³.

Acceptance when to be made.

Such acceptance must be made during the life-time of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void ⁴.

Transfer how effected,

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses ⁵.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery ⁶.

Such delivery may be made in the same way as goods sold may be delivered ⁷.

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter ⁸.

¹ That gifts to persons standing in a fiduciary relation to the donors will not be upheld unless the donors had competent and independent advice, see 7 Bom. H. C., O. C. J. 27, following *Rhodes v. Bate*, L. R., 1 Ch. App. 257, per Turner L.J.

² This includes a corporation, Act I of 1868, sec. 2, cl. (3).

³ If the donee be in his mother's womb the acceptance is made on his behalf by the person under whose authority he will be placed on his birth, 2 Burge, Comm. 143.

⁴ The concurrence of the donor and donee must take place in order to render the donation perfect, 2 Burge,

143-144.

⁵ This seems to affect the rule of Hindú law that a gift of immoveable property is invalid if the donor retains possession and there is no symbolical delivery, 9 Cal. 855. A registered instrument duly signed and attested will henceforward be sufficient; see Act III of 1877, sec. 17, cl. (a). A gift to an attesting witness or his or her wife or husband is not void.

⁶ 6 All. 634.

⁷ See the Contract Act, sec. 90.

⁸ Code of Lower Canada, § 778, which, however, excepts the case of gifts made par contrat de mariage.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted ¹.

Gift to several, of whom one does not accept.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded ².

Save as aforesaid, a gift cannot be revoked ³.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a l  kh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the l  kh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully ⁴.

Onerous gifts.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the

¹ See Burge, Comm. ii. 144. There is here no *ius accrescendi*.

² As, for instance, where the donor is induced to make the gift by coercion or fraud. See Code Civil, §§ 944, 947, 953, 956: Code of Lower Canada, secs. 783, 811.

³ It cannot therefore be revoked *ob ingratitudinem donatarii*. As to conditional gifts, see supra, secs. 30-34. When a gift is complete at the time when the actual transfer took place, the parties cannot afterwards import a

condition, 6 All. 321, per Sir A. Hobhouse; L. R. 11 I. A. 44. Where the donation has been made *sub conditione* and *pendente conditione* the donee dies the contingent interest is transmissible to his heirs. So the death of the donor before the performance of the condition on which the gift was to become the property of the accepting donee will not deprive the latter of it, 2 Burge, Comm. 144.

⁴ Act X of 1865, sec. 66.

others, although the former may be beneficial and the latter onerous¹.

Onerous
gift to dis-
qualified
person.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) *A* has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in *Y*. *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(b) *A*, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

Universal
donee.

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein².

Saving of
donations
mortis
causæ and
Native law.

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law³, or, save as provided by section 123, any rule of Hindú or Buddhist law⁴.

¹ Act X of 1865, sec. 100.

² Code of Lower Canada, § 797.

³ As to Muhammadan gifts in Bengal, 2 Cal. 184, 197; 9 Cal. 138; 10 Cal. 1112; 7 Bom. H. C., O. C. J. 27; 6 Bom. 650; 9 Bom. 146; in the N. W. Provinces, 5 N. W. P. (1873), 5; 5 All. 285. Gifts by sick persons, 2 All. 854; 3 All. 731. Tribal custom in Oudh that a gift by way of maintenance is resumable at the donor's will, L. R., 10 L. A. 133.

⁴ As to Hindú gifts, see West &

Bühler, 3rd ed., pp. 179-183, 186, 187, 190, 191, 207, 441, etc.: Mayne on Hindú law, §§ 328, 329; 7 Bom. 452. As to the Buddhist law on the subject, see *The Dhamatthā*, Rangoon, 1874, pp. 230-242. Gifts to a god, 8 Bom. 432, 455. Gift on condition that the subject-matter should devolve on male descendants only is void according to Hindú law, 6 Cal. 427; and see 9 Ben. 394 as to the general rule that gifts *inter vivos* can confer only interests recognised by law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. A claim which the civil Courts recognise as affording Actionable claim. grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary¹.

131. No transfer of any debt² or any beneficial interest in Transfer of debts. moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him³, unless he is a party to or otherwise aware of such transfer⁴; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer⁵.

Illustration.

A owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, having no notice of the transfer, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

132. Every such notice must be in writing signed by the Notice to be in writing signed. person making the transfer, or by his agent duly authorized in this behalf.

133. On receiving such notice, the debtor or person in whom Debtor to give effect to transfer. the property is vested shall give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour

¹ Compare the narrower definition in the Code of Lower Canada, § 1583: the 'droit est réputé litigieux lorsqu'il est incertain, disputé ou disputable par le débiteur soit que le demande en soit intentée en justice, ou qu'il y ait lieu de présumer qu'elle sera nécessaire.' See, too, Code Civil, § 1700.

² This does not include a decree, 12 Cal. 610.

³ *Stocks v. Dobson*, 4 D. M. G. 15.

⁴ That the obligor's consent is not necessary to the assignment of a common money-bond, see 1 Mad. H. C. 139. See 36 & 37 Vic. c. 66, sec. 25 (b): 1 Mad. H. C. 150.

⁵ 12 Cal. 505, 506: *Ryall v. Bowles*, 2 White and Tudor, L. C., 5th ed. pp. 765-816.

the transfer is made is not complete according to the law of such country ¹.

Warranty
of solvency
of debtor.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration ².

Discharge
of person
against
whom
claim is
sold.

135. Where an actionable claim ³ is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section applies—

(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

(b) where it is made to a creditor in payment of what is due to him;

(c) where it is made to the possessor of a property subject to the actionable claim;

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment ⁴.

Incapacity
of officers
connected
with
Courts of
justice.

136. No judge, pleader, mukhtár, clerk, bailiff or other officer connected with Courts of justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions ⁵.

Liability of
transferee
of debt.

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer ⁶.

¹ Fisher, § 141: *Sichel v. Raphael*, 10 Jur. N. S. 1165.

² Code Civil, § 1695: Code of Lower Canada, § 1577: Pothier, Vente, 570.

³ 13 Cal. 470: 13 Cal. 297.

⁴ This section is taken from the Code of Lower Canada, §§ 1582, 1584. It does not absolutely prevent the buyer from recovering the full amount of the debt, 13 Cal. 145.

⁵ 9 Mad. 5, 9. The High Court

N. W. P. had ruled in 1870 that it was not expedient that pleaders engaged in suits should become the persons entitled to execute the decrees, 2 N. W. P. 47.

⁶ *Crouch v. Crédit Foncier of England*, L. R., 8 Q. B. 380: *Mangles v. Dixon*, 3 H. L. C. 735. The illustration is not very appropriate. The debenture not being negotiable, B, of course, is in no better position than the transferor A.

Illustration.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor¹.

Mortgaged
debt.

139. Nothing in this chapter applies to negotiable instruments².

Saving of
negotiable
instru-
ments.

¹ Davidson's Conv., 4th ed., vol. ii. part ii. p. 727. That the mortgagee of a debt is liable for its loss if it becomes irrecoverable by his wilful default, see *Williams v. Price*, 1 S. & S. 581.

² They are dealt with by Act XXVI of 1881, *supra*. As to the transfer of a promissory note made payable simply to the payee without the addition of the words 'order,' or

'bearer,' and therefore not negotiable, see 1 All. 732. As to the assignability of contracts between Hindús, and the assignee's power to sue in his own name, 4 Mad. H. C. 176. That a contract for the delivery of shares at a future day is assignable, see 8 Bom. H. C., A. C. J. 133. As to the transfer of a mortgagee's rights as such, 2 Mad. 212.

THE SCHEDULE.

(a)—*Statutes.*

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10.	Uses	The whole.
13 Eliz., c. 5 .	Fraudulent conveyances.	The whole.
27 Eliz., c. 4 .	Fraudulent conveyances.	The whole.
4 Wm. & Mary, c. 16.	Clandestine mortgages.	The whole.

(b)—Acts of the Governor-General in Council.

Number and year.	Subject.	Extent of repeal.
IX of 1842 .	Lease and release .	The whole.
XXXI of 1854	Modes of convey- ing land.	Section 17.
XI of 1855 .	Mesne profits and improvements.	Section 1; in the title, the words 'to mesne profits and,' and in the preamble 'to limit the liability for mesne profits and.'
XXVII of 1866	Indian Trustee Act	Section 31.
IV of 1872 .	Panjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 .	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806 ¹ .
XVIII of 1876	Oudh Laws Act .	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 . .	Specific Relief. .	In sections 35 and 36, the words 'in writing.'

(c)—Regulations.

Number and year.	Subject.	Extent of repeal.
Bengal Regu- lation I of 1798.	Conditional sales .	The whole Regulation ¹ .
Bengal Regu- lation XVII of 1806.	Redemption . .	The whole Regulation ¹ .
Bombay Regu- lation V of 1827.	Acknowledgment of debts: In- terest: Mort- gages in posses- sion.	Section 15 ² .

¹ As the Transfer of Property Act has not yet been extended to the Panjab, these enactments are still in force in that Province.

² As the Transfer of Property Act has not yet been extended to Bom-
bay, this section is still in force.

ACT XXVIII OF 1866, SECS. 6-19.

(See p. 783, *supra*.)

POWERS OF MORTGAGEES.

6. Where any principal-money is secured or charged by deed on any immoveable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal-money shall have become payable according to the terms of the deed, or after any interest on such principal-money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:—

Powers
incident to
mortgages.

1st, a power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy-in and resell the property, from time to time, in like manner :

2nd, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money¹.

Receipts
for pur-
chase-
money.

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property ;

Notice
before sale.

but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as

Purchaser
relieved
from
inquiry as
to circum-
stances of
sale.

¹ 23 & 24 Vic., c. 145, s. 12.

aforesaid had been given; but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person or persons selling¹.

Applica-
tion of pur-
chase-
money.

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:—

first, in payment of all the expenses incident to the sale or incurred in any attempted sale;

secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and

thirdly, in discharge of all the principal-moneys then due in respect of such charge;

and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators, or assigns, as the case may be².

Convey-
ance to
purchaser.

10. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of.

Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee simple of the property comprised therein in cases where the mortgagor could have disposed of such fee simple at the date of the mortgage³.

Owner of
charge may
call for
title-deeds
and con-
veyance of
legal es-
tate.

11. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of;

and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made⁴.

¹ 23 & 24 Vic., c. 145, s. 13.

² 23 & 24 Vic., c. 145, s. 14.

³ 23 & 24 Vic., c. 145, s. 15.

⁴ 23 & 24 Vic., c. 145, s. 16.

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid, may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit¹.

Appointment of receiver.

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults unless otherwise provided for in the charge².

Receiver deemed agent of mortgagor.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed receiver, by suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of³.

Powers of receiver.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time⁴.

Receiver may be removed, and new receivers appointed.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount⁵.

Receiver to receive commission not exceeding five per cent.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable⁶.

Receiver to insure if required.

¹ 23 & 24 Vic., c. 145, s. 17.

⁴ 23 & 24 Vic., c. 145, s. 20.

² 23 & 24 Vic., c. 145, s. 18.

⁵ 23 & 24 Vic., c. 145, s. 21.

³ 23 & 24 Vic., c. 145, s. 19.

⁶ 23 & 24 Vic., c. 145, s. 22

Application of moneys received by him.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any; and in the next place in payment of all the interest accruing due in respect of any principal-money then charged on the property over which he is receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns¹.

This part to relate to charges by way of mortgage only.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt².

¹ 23 & 24 Vic., c. 145, s. 23.

² 23 & 24 Vic., c. 145, s. 24.

INTRODUCTION TO THE TRUSTS ACT.

TRUSTS, in the strict sense in which that term is used by English lawyers, that is to say, confidences to the existence of which a double ownership, a 'legal' and an 'equitable' estate, are necessary, are unknown to Hindú and Muhammadan law¹. But trusts in the wider sense of the word, that is to say, obligations annexed to the ownership of property which arise out of a confidence reposed in and accepted by the owner for the benefit of another, are constantly created by the Natives of India and are frequently enforced by our Courts. 'There is probably,' said Mr. Justice Phear², 'no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India; and possession of dominion over property, coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor, is, I imagine, familiar to every Hindú.' So, too, in the case of Muhammadans, where a woman is entitled to a share of her deceased father's estate in the hands of her brother³, or to exigible dower in the hands of her husband⁴. Trusts created by an old man for his own maintenance and for ulterior purposes, trusts created for a widow, or for a daughter, step-daughter, or daughter-in-law and her children, trusts for the maintenance of a family idol⁵, are of frequent occurrence among Indians whether Hindú or Muhammadan, and it was desirable to keep these trusts free from the complication of double estates, in which, without the intervention of the legislature, they would probably have become entangled.

The system of *benámí*, or the enjoyment of the profits of property held by another in trust for the beneficiary, was familiar to the people of India before the introduction of British rule, and the implied trusts in case of a *benámí* purchase were recognised and established in the Judicial Committee⁶. In no country, owing

¹ *Tagore v. Tagore*, 9 Ben. 401, per Willes J. To the double ownership in English trusts there seems no clear parallel either in Roman law or in the modern systems founded thereon. Even the separation of quiritarian and bonitarian ownership is of a materially different nature. See an article in *The Academy* for Aug. 14, 1886, p. 99, by Mr. G. P. Macdonell.

² 4 Ben. O. C. J. 134.

³ *Suth.* 1864, p. 377, col. 2.

⁴ 6 *Suth. Civ. R.* 111.

⁵ These trusts give the trustee a valuable interest and are dissoluble only by the assent of the whole family or of all concerned, when the idol is open to public worship, *West & B.* 203.

⁶ 6 *Moo. I. A.* 53; 9 Ben. 401.

to the extreme subdivision of immoveable property and the partition of inheritances, are constructive trusts more common. Apart from the Native property-holder, there is the large body of domiciled Europeans and Eurasians, who have for nearly a century enjoyed and taken advantage of a trust-law recognised by our Courts; and now that the number and wealth of this class have increased, and every Court in the country may be called upon to administer a trust-law, the question of the advisability of its codification seems no longer open to discussion¹.

Before 1882 the statutory law relating to trusts was contained in 29 Car. II, c. 31, secs. 7-11, Act XXVII of 1866 (=13 & 14 Vic. c. 60 and 15 & 16 Vic. c. 5), Act XXVIII of 1866 (=22 & 23 Vic. c. 35 and 23 & 24 Vic. c. 145). But the Statute of Frauds was in force only in the Presidency Towns, and the two Acts of 1866 extended only to cases to which English law is applicable. There were also a few isolated provisions relating to trusts scattered through the Penal Code², the Specific Relief Act³, the Civil Procedure Code⁴, the Stamp Act⁵, the Limitation Act⁶, the Government Securities Act⁷, the Companies Act⁸, and the Presidency Banks Act⁹.

The Trusts Act, especially the ninth chapter, therefore supplies a defect in the codified law of British India; and though it has not yet been extended to the Presidency of Bombay, the Lower Provinces, Ajmer and Merwára, the Andaman Islands or Burma, it is in force in all the other Provinces, and has been found of practical utility to the Mufassal Courts and pleaders.

The Act is divided into nine chapters: the first containing preliminary matter, the others dealing respectively with the creation of trusts; the duties and liabilities of trustees; their rights and powers; their disabilities; the rights and liabilities of the beneficiary; vacating the office of trustee; the extinction of trusts; and, lastly, certain obligations in the nature of trusts, under which head the Act deals with what English lawyers call constructive and resulting trusts.

CHAPTER I. PRELIMINARY.

This chapter declares that nothing in the Act shall affect *in malam partem*

¹ Report of the Indian Law Commission, 1879, pp. 48, 49.

² ss. 405-409.

³ ss. 12 (a), 21, 54. ⁴ ss. 266, 437.

⁵ Act I of 1879, sched. 1, Nos. 25,

56, 60.

⁶ ss. 3, 10, sched. Nos. 98, 100.

⁷ Act III of 1881, s. 4.

⁸ Act VI of 1882, s. 53.

⁹ Act XI of 1876, s. 22.

(a) the rules of Muhammadan law as to waqf, that is, transfers or bequests of property for religious or charitable purposes :

(b) the mutual relations of the members of an undivided family as determined by any customary or personal law.

It also declares that nothing in the Act applies to

(c) public or private religious or charitable endowments¹, or

(d) trusts to distribute prizes taken in war amongst the captors².

It declares, lastly, that nothing in the chapter relating to the creation of trusts applies to trusts created before the 1st March, 1882.

To avoid the risk of confounding trusts with bailments³, the Act defines 'trust' as 'an obligation annexed to the ownership of property, and arising out of confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner³.' And to prevent the introduction into the Mufassal of conceptions resembling the English legal estate and equitable ownership, the 'beneficial interest' of the beneficiary is defined as 'his right against the trustee as owner of the trust property.' Under the Act, the beneficiary has no estate or interest in the subject-matter of the trust. 'Breach of trust' is the breach of any duty imposed on a trustee as such by any law for the time being in force.

¹ This total exclusion is unfortunate, as, amongst Hindús, it is these classes of trusts which most frequently form the subjects of litigation, West & B., 3rd ed., p. 441, note. It would have sufficed to have said that nothing in the Act should affect the rules relating to public or private religious or charitable endowments. The generally inalienable character of endowments under the Hindú as under the Muhammadan law is recognised by the Courts, and in some places also by the Legislature; see Bom. Act II. of 1863, s. 8. The Government in 1863 withdrew from the management of these endowments, passing an Act (XX of 1863) handing it over to bodies of Natives, which was extended to Kanara by Bom. Act VII of 1865. See also the Code of Civil Procedure, sec. 530.

² As to these, see *Alexander v. Duke of Wellington*, 2 R. & M. 35 :

Kinlock v. Secretary of State for India in Council, 15 Ch. D. 1: 7 App. Ca. 619, where the appellant's name is *Kinlock*. Mr. Lewin thus states the effect of these decisions:—'All prizes taken in war vest in the sovereign and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed mode among the captors; but an interest of this kind is held not to vest an interest in the *cestuis que trust* which they can enforce in equity, but it may at any time be revoked or varied at the pleasure of the sovereign before the general distribution. The effect of such an instrument is merely to appoint the persons named to be the agents of the sovereign to effect the distribution.'

³ The definition of 'trusts' in the draft New York Civil Code, § 1681, seems open to this criticism.

'Registered' and 'notice' are defined as in the Transfer of Property Act, *supra* p. 747, and all expressions used in the Trusts Act and defined in the Contract Act—e.g. 'fraud'—are to have the meaning attributed to them by the latter Act.

CHAPTER II. OF THE CREATION OF TRUSTS.

Here the Act declares that a trust may be created for any lawful purpose, and that a purpose is lawful unless it comes within any of the categories mentioned in the Contract Act, sec. 23: that every trust of which a purpose is unlawful is void: and that where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void. An explanation suggested by *Nelson v. Bridport*, 8 Beav. 547, shows that where the trust property is land situate in a foreign country the trust to be valid must be in accordance with the law of that country.

It is obviously desirable to exclude oral declarations of trust whenever land forms the subject-matter. Section 5 therefore declares, in general accordance with the seventh section of the Statute of Frauds, that no trust in relation to immoveable property is valid unless declared (a) by a non-testamentary instrument in writing, signed by the author of the trust or the trustee and registered, or (b) by the will of the author of the trust or the trustee. Theoretically, this modifies the Hindú law, which in no transaction absolutely requires a writing¹; but trusts by merely verbal declaration are as rarely met with as mortgages by merely verbal agreements: the change, therefore, in practice makes no alteration.

In case of trusts of moveable property, they must either be declared as aforesaid, or the ownership of the property must be transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud, as, for example, where a father having power to bequeath certain land is induced not to make a will of that land by the promise of his heir presumptive that he will provide thereout for his relatives².

Section 6 states the four requisites to the creation of every trust, and adds a fifth—the transfer of the trust property—except where the trust is declared by will or the author of the trust is himself to be the trustee. In England it now seems impossible for an infant

¹ 2 Mad. H. C. 39, per Holloway J. The dictum of Spankie J., 3 All. 466, if meant to apply to Natives, is clearly wrong.

² *Sellack v. Harris*, 5 Vin. Ab. 521, and other cases cited by Lewin, 8th ed., 61.

to create (except in the case of a marriage settlement¹) a trust which cannot be set aside, for he cannot make a will, and his deeds may be avoided. Under section 7 however a minor may, with the permission of the Court, create a valid trust.

The subject-matter of every trust must be property transferable to the beneficiary; and in order to preclude the complications that would arise from allowing a trust upon a trust, section 8 declares that the subject-matter must not be a merely beneficial interest under a subsisting trust.

Section 9 declares that every person capable of holding property may be a beneficiary. As under the General Clauses Act 'person' includes a corporation, the Act here varies from English law. But the variation is intentional, as it has been more than once ruled that the Mortmain Statutes are not in force in India.

The Act provides for disclaimers by proposed beneficiaries as well as by intended trustees.

CHAPTER III. OF THE DUTIES AND LIABILITIES OF TRUSTEES.

Their duties are to execute the trust (sec. 11), to inform themselves of the state of the trust-property (sec. 12), to protect the title thereto (sec. 13), not to set up a title adverse to the interest of the beneficiary (sec. 14), to take due care of the trust property (sec. 15), to convert perishable or reversionary property when the trust is for several persons in succession (sec. 16), to be impartial (sec. 17), to prevent waste (sec. 18), to keep accounts and render information (sec. 19), and, lastly, to invest trust-funds on certain specified securities (sec. 20). The necessity for this last provision was pointed out by the High Court of Bombay in *De Souza v. De Souza*, 12 Bom. H. C. 184. As to these securities, the late Chief Justice of Bombay remarked, in his comments on the Bill, that in parts of India the most ordinary and popular investment made by Native trustees is an investment of money with merchants or shroffs of good repute to run at interest. The Act therefore, in addition to the specified securities, authorises investment on securities expressly authorised by the instrument of trust or by any rule which the High Court may from time to time prescribe on this behalf. Investments on mortgages of leaseholds for years are forbidden, unless of course such investments are expressly authorized by the trust-deed. In England, no doubt, trustees empowered to lend on a mortgage of realty may invest on a long term of years at a peppercorn rent. But in India such terms are practically

¹ See 18 & 19 Vic. c. 43.

unknown. Section 21 allows a trustee to deposit a trust-fund not exceeding Rs. 3000 in a Government Savings Bank¹, and to invest on mortgage of land already pledged as a security for an advance under the Land Improvement Act, 1871. A power like the latter is conferred in England by 27 & 28 Vic. c. 114, s. 161.

Liabilities of trustees. The liabilities of trustees are: to make good losses which the trust property has sustained by a breach of trust (sec. 23), with special provisions where gain has accrued to a portion of the trust property through another breach (sec. 24), where the breach has been committed by their predecessors (sec. 25), or by their co-trustees (sec. 26), or by co-trustees jointly (sec. 27). The principle here followed is that the trustee shall not profit by his own wrong. Section 23 embodies as illustrations the rules on which Courts of Equity act where trust-property improperly left outstanding is lost, or where a trustee retains money which should be invested, or neglects a direction to invest, or to accumulate, or improperly sells trust-property, or is guilty of unreasonable delay in investing trust-funds or in paying them to the beneficiary. When the beneficiary's interest is forfeited to Government, the trustee must hold the trust-property to the extent of such interest for the benefit of such person as the Government directs.

CHAPTER IV. OF THE RIGHTS AND POWERS OF THE TRUSTEE.

Rights of Trustee. This chapter embodies the substance of Act XXVIII of 1866, secs. 2, 3, 5, 32, 33, 36, 37, 39 and 43. The trustee's rights are to have in his possession the instrument of trust and the title-deeds relating solely to the trust-property² (sec. 31); to reimburse himself his expenses properly incurred in the execution of the trust or the protection or support of the beneficiary, and to be recouped for erroneous over-payments to him (sec. 32); to be indemnified by the gainer by a breach of trust (sec. 33); to apply to the Court (i.e. either a High Court Judge or a District Judge) for guidance in the management of the trust-property (sec. 34); and, on completing his duties, to have the accounts settled (sec. 35).

Powers of Trustee. His powers are generally to do all acts proper for the benefit of the trust property and for the protection or support of beneficiaries incompetent to contract; but except with the permission of the Court, no trustee can lease trust-property for a term

¹ See Act V of 1873. Power to deposit municipal funds in such banks is given by Madras Act III of 1871, s. 36, and Ben. Act V of 1876, s. 75.

² The English rules on this subject (Lewin, 679) are complicated by the double ownership of trustee and *cestui que trust*.

exceeding twenty-one years (sec. 36). A trustee for sale has also the usual powers to sell in lots and either by public auction or private contract (sec. 37), to sell under special conditions, buy in, re-sell, and fix the time for selling (sec. 38), to convey on completion (sec. 39). The trustee may vary investments, but only with the consent in writing of the beneficiary when the latter is competent to contract and entitled at the time to receive the income of the trust-property for his life (sec. 40). Trustees for minors may apply the income not only for their maintenance, education and advancement, but also for the reasonable expenses of their religious worship¹, marriage, and funeral; and with the permission of the Court, such trustees may apply the property itself to the minor's maintenance, education, and advancement (sec. 41). Trustees, too, may give receipts for trust-moneys, which, in the absence of fraud, will be good discharges (sec. 42). Two or more trustees acting together may compound or allow time for payment of debts or claims relating to the trust (sec. 42). A like power had been given, by Act XXVIII of 1866, to executors. When one of several trustees disclaims or dies, the authority to deal with the trust property may as a rule be exercised by the continuing trustees (sec. 44). Lastly, the Act provides (sec. 45) for the suspension of a trustee's powers by a decree in a suit for the execution of the trust.

CHAPTER V. OF THE DISABILITIES OF TRUSTEES.

Here the Act declares that a trustee who has once accepted the trust cannot renounce it except with the permission of the Court, the consent of the beneficiary, or by virtue of a special power in the instrument of trust (sec. 46). He cannot as a rule delegate his office or any of its duties (sec. 47). Co-trustees cannot act singly (sec. 48). If a trustee fails to exercise a discretionary power reasonably and in good faith, such power may be controlled by the Court (sec. 49). He must not charge for his services, unless (a) the instrument of trust contains express directions to the contrary, or (b) he has when accepting the trust entered into a contract to the contrary with the beneficiary or the Court (sec. 50). He must not use the trust-property for his own profit (sec. 51), and if he does, an obligation in the nature of a trust arises (sec. 88). If he be a trustee for sale of trust-property, he or his agent must not buy it (sec. 52). The transaction is absolutely void, not merely, as in

¹ This clause was inserted at the suggestion of a body of Native gentlemen, called the British Indian Association.

England, void at the option of the beneficiary. Nor must the trustee, without the permission of the Court, buy or take a mortgage or lease of the trust-property (sec. 53), and such permission is not to be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary. The Act here deviates from the English law, according to which a trustee is allowed to buy trust-property from his beneficiary if the latter is *sui juris* and the former can show that the relation of trustee and beneficiary was, at the time of the purchase, virtually dissolved, and that the fullest information and every advantage were given to the beneficiary¹. Such a rule seemed too vague for insertion in a Code intended to be worked, for the most part, by unprofessional judges. It has, moreover, been disapproved in *Morse v. Royal*, 12 Ves. 372. And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for his beneficiary may buy it, or obtain a lease or mortgage of it for himself:

CHAPTER VI. OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

Rights of
beneficiary.

The beneficiary's rights are: to have the rents and profits of the trust-property (sec. 55); to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest (sec. 56); where the beneficiary is competent to contract, to require the trustee to transfer the trust-property to him or such person as he may direct (sec. 56); and to inspect and take copies of the instrument of trust, title-deeds relating solely to the trust-property, accounts, vouchers, etc. (sec. 57). If competent to contract, he may transfer his interest, subject to the law as to the circumstances and extent to which he may dispose of it (sec. 58). He has a right to sue for execution of the trust by the Court, where no trustees are appointed, or all the trustees die, disclaim, or are discharged (sec. 59). He has a right (sec. 60) that the trust-property shall be held and administered by proper persons and a proper number of such persons. And the following are declared not to be 'proper persons' for this purpose: a person domiciled abroad; an alien enemy; a person having an interest inconsistent with that of the beneficiary; a person in insolvent circumstances; and, *unless the personal law of the beneficiary allows otherwise*, a married woman and a minor. The words in italics were inserted because, in Hindú and Muhammadan families,

¹ See Lewin, 8th ed., pp. 487, 488.

a minor son often succeeds to property burthened with a trust for dependent relations of his father, and a married woman is sometimes made by her father trustee for herself and her son or daughter. Section 61 declares the beneficiary's right to have his trustee compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust. Sections 62, 63, 65 declare the rights of the beneficiary (a) in case of a wrongful purchase by the trustee, (b) in case the trust-property comes into the hands of a third person inconsistently with the trust, or the trustee has converted it into money or other property, and (c) in case the trustee wrongfully transfers trust-property and afterwards becomes its owner. Section 64 agrees with the English rule, which, to prevent stagnation of property, exempts from the trust a purchaser with notice from an innocent purchaser without notice, who has got the legal estate. Where the trustee wrongfully transfers the trust-property, and afterwards himself becomes its owner, the property again becomes subject to the trust (sec. 65). Where the trustee wrongfully mingles trust-property with his own, the beneficiary (sec. 66) is entitled to a charge on the whole fund for the amount due to him. This accords with *Cook v. Addison*, L. R., 7 Eq. 470. Section 67 declares that if a partner, being a trustee, wrongfully employs trust-property in the business, his co-partners are personally liable if they have notice of the breach of trust, but not otherwise.

Section 68 declares the liability of a co-beneficiary, 1, where one of several beneficiaries joins in a breach of trust, or, 2, knowingly obtains any advantage therefrom without the consent of the other beneficiaries, or, 3, becomes aware of a breach and either conceals it or does not take steps to protect the interests of the others, or, lastly, deceives the trustee and thereby induces him to commit a breach. In each of such cases the other beneficiaries are entitled to have all his beneficial interest impounded until the loss caused by the breach has been compensated.

Liability
of bene-
ficiary.

CHAPTER VII. OF VACATING THE OFFICE OF A TRUSTEE.

The office of a trustee is vacated by his death or by his discharge from office, and the six modes in which he may be discharged are stated in section 71. Power is given to trustees to petition the Court for a discharge (sec. 72). The rest of this chapter contains rules as to the appointment of new trustees, and as to the survival of the trust on the death or discharge of one of several co-trustees. It

was supposed that retiring trustees would probably be indifferent to the interest of the beneficiary. The power of such trustees to appoint a new trustee is therefore exercisable only with the consent of the Court (sec. 73, cl. b).

CHAPTER VIII. OF THE EXTINCTION OF TRUSTS.

The Act here declares the four cases in which a trust is extinguished—when its purpose is fulfilled, or becomes unlawful; when the fulfilment becomes impossible; when the trust is revoked. It also shows when a trust may be revoked by its author, but declares that no such revocation can be made so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

CHAPTER IX. OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Constructive trusts. Where no trust is declared, but for the purposes of justice the law deems one to have been created by certain acts of parties, the trust is by English lawyers termed 'constructive.' Where an interest is given for purposes to which the trust is not commensurate, as, for instance, to pay debts which are afterwards satisfied, or an annuity which afterwards expires, the trust is termed 'resulting.'

Resulting trusts.

Chapter IX, the most important in the Act, corresponds with the chapter on Quasi-contracts in the Contract Act, and specifies some twenty of the commonest cases in which such trusts arise. They are—

(a) where the owner of property transfers or bequeaths it, and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein (sec. 81);

(b) where property is transferred to *A* for a consideration paid by *B*, and it appears that *B* did not intend to pay the consideration for *A*'s benefit (sec. 82);

(c) where a trust is incapable of execution or is completely executed without exhausting the trust property (sec. 83);

(d) where *A*, the owner of property, transfers it to *B* for an illegal purpose, and such purpose is not carried into execution (sec. 84);

(e) where *A* bequeaths certain property for an illegal purpose (sec. 85);

(f) where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake (sec. 86);

(g) where a debtor becomes the executor or other legal representative of his creditor (sec. 87);

(h) where *A*, bound in a fiduciary character to protect the interests of *B*, by availing himself of such character gains any pecuniary advantage (sec. 88);

(i) where *A*, being so bound, enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of *B*, and thereby gains for himself a pecuniary advantage (sec. 88);

(j) where by the exercise of undue influence *A* gains some advantage in derogation of the interests of *B* without consideration, or with notice that such influence has been exercised (sec. 89);

(k) where a tenant for life or other qualified owner of any property, by availing himself of his position gains an advantage in derogation of the rights of the other persons interested in the property (sec. 90);

(l) where any such owner, as representing all persons interested in the property, gains any advantage (sec. 90);

(m) where *A* acquires property with notice that *B* has entered into an existing contract affecting that property, of which specific performance could be enforced (sec. 91);

(n) where a person contracts to buy property to be held on trust for certain beneficiaries, and buys the property accordingly (sec. 92);

(o) where creditors of *B* compound the debts due to them, and one of such creditors, by a secret arrangement with *B*, gains an undue advantage over his co-creditor (sec. 93);

(p) in any other case, where there is no trust, but the person having possession of property has not the whole beneficial interest therein.

Whoever holds property in accordance with any of these clauses, must, so far as may be, perform the same duties and is (with two exceptions) liable to the same disabilities as if he were a trustee of the property for the person for whose benefit he holds it. The two exceptions are, (1) where he rightfully cultivates the property or employs it in trade or business he is entitled to reasonable remuneration for his trouble, skill and loss of time, and (2) where he holds the property by virtue of a contract with the person for whose benefit he holds he may, without the permission of the Court, buy or take a lease or mortgage of the property.

The resulting trusts provided for by sec. 83 are treated by the Act as obligations in the nature of trusts, for here there is no declaration of trust as to the portion of the trust-property which is not wanted for the purpose declared, and such declaration is

Resulting trusts.

required by sec. 6. Where a person gives property to charitable purposes, and either specifies no objects, or such as do not exhaust the proceeds, the law of England does not suffer the property or its surplus to result to the donor or his legal representatives; but the Court takes upon itself to execute the donor's intention by declaring the particular purposes to which the fund shall be applied. A similar exception is made when the purposes of the gift at the time exhaust the whole proceeds, but in consequence of an increase in the value of the property an excess of income subsequently arises. The Act (sec. 83, ill. c) ignores these exceptions, which were introduced when the law of resulting trusts was imperfectly understood, and which unfairly disregard the interest of the donor's legal representative.

Lastly, it may be remarked that the Act contains no provisions as to the presumption against trustees that advantages gained by them from their beneficiaries are gained by undue influence, or as to the escheat of beneficiaries' interests. The former matter seems sufficiently provided for by the Evidence Act I of 1872, sec. 111: the latter, by the Succession Act X of 1865, sec. 28, and the general law as to *bona vacantia*¹. See now in England 47 & 48 Vic. c. 71, sec. 4.

History of the Act. The Bill which became the Trusts Act was drawn by the writer, revised by the Law Commission in 1879, published and circulated to local authorities in 1880, introduced into the Council in June 1881, and referred to a Select Committee, from which it emerged with but little alteration. It was passed in January 1882. Having been five years in force throughout the greater part of British India², without (so far as can be judged from the law-reports and the total absence of amending legislation) giving rise to any hardship or difficulty, it now seems ripe for extension to the Lower Provinces and Bombay.

¹ See 16 & 17 Vic. c. 95, sec. 27: 21 & 22 Vic. c. 106, sec. 39.

² The population to which it applies is 111,398,002 in number.

THE INDIAN TRUSTS ACT, 1882.

CONTENTS.

Preamble.

CHAPTER I.

PRELIMINARY.

	SECTION
Short title	1
Commencement	<i>ib.</i>
Local extent	<i>ib.</i>
Savings	<i>ib.</i>
Repeal of enactments	2
Interpretation-clause	3
Expressions defined in Act IX of 1872	<i>ib.</i>

CHAPTER II.

OF THE CREATION OF TRUSTS.

Lawful purpose	4
Trust of immoveable property	5
Trust of moveable property	<i>ib.</i>
Creation of trust	6
Who may create trusts	7
Subject of trust	8
Who may be beneficiary	9
Disclaimer by beneficiary	<i>ib.</i>
Who may be trustee	10
No one bound to accept trust	<i>ib.</i>
Acceptance of trust	<i>ib.</i>
Disclaimer of trust	<i>ib.</i>

CHAPTER III.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

Trustee to execute trust	11
Trustee to inform himself of state of trust-property	12
Trustee to protect title to trust-property	13
Trustee not to set-up title adverse to beneficiary	14
Care required from trustee	15
Conversion of perishable property	16
Trustee to be impartial	17

	SECTION
Trustee to prevent active waste	18
Accounts and information	19
Investment of trust-money	20
Mortgage of land pledged to Government under Act XXVI of 1871	21
Deposit in Government Savings Bank	ib.
Sale by trustee directed to sell within specified time	22
Liability for breach of trust	23
No set-off allowed to trustee	24
Non-liability for predecessor's default	25
Non-liability for co-trustee's default	26
Joining in receipt for conformity	ib.
Several liability of co-trustees	27
Contribution as between co-trustees	ib.
Non-liability of trustee paying without notice of transfer by beneficiary	28
Liability of trustee where beneficiary's interest is forfeited to Government	29
Indemnity of trustees	30

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

Right to title-deeds	31
Right to reimbursement of expenses	32
Right to be recouped for erroneous over-payment	ib.
Right to indemnity from gainer by breach of trust	33
Right to apply to Court for opinion in management of trust-property	34
Right to settlement of accounts	35
General authority of trustee	36
Power to sell in lots, and either by public auction or private contract	37
Power to sell under special conditions	38
Power to buy-in and re-sell	ib.
Time allowed for selling trust-property	ib.
Power to convey	39
Power to vary investments	40
Power to apply property of minors &c. for their maintenance, &c.	41
Power to give receipts	42
Power to compound, &c.	43
Power to several trustees of whom one disclaims or dies	44
Suspension of trustee's powers by decree	45

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance	46
Trustee cannot delegate	47
Co-trustees cannot act singly	48
Control of discretionary power	49
Trustee may not charge for services	50
Trustee may not use trust-property for his own profit	51

	SECTION
Trustee for sale or his agent may not buy	52
Trustee may not buy beneficiary's interest without permission	53
Trustee for purchase	ib.
Co-trustees may not lend to one of themselves	54

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

Rights to rents and profits	55
Right to specific execution	56
Right to transfer of possession	ib.
Right to inspect and take copies of instrument of trust, accounts, &c.	57
Right to transfer beneficial interest	58
Right to sue for execution of trust	59
Right to proper trustees	60
Right to compel to any act of duty	61
Wrongful purchase by trustee	62
Following trust-property—	
into the hands of third persons	63
into that into which it has been converted	ib.
Saving of rights of certain transferees	64
Acquisition by trustee of trust-property wrongfully converted	65
Right in case of blended property	66
Wrongful employment by partner-trustee of trust-property for partnership purposes	67
Liability of beneficiary joining in breach of trust	68
Rights and liabilities of beneficiary's transferee	69

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated	70
Discharge of trustee	71
Petition to be discharged from trust	72
Appointment of new trustees on death, &c.	73
Appointment by Court	74
Rule for selecting new trustees	ib.
Vesting of trust-property in new trustees	75
Powers of new trustees	ib.
Survival of trust	76

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

Trust how extinguished	77
Revocation of trust	78
Revocation not to defeat what trustees have duly done	79

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

	SECTION
Where obligation in nature of trust is created	80
Where it does not appear that transferor intended to dispose of beneficial interest	81
Transfer to one for consideration paid by another	82
Trust incapable of execution or executed without exhausting trust-property	83
Transfer for illegal purpose	84
Bequest for illegal purpose	85
Bequest of which revocation is prevented by coercion	86
Transfer pursuant to rescindable contract	87
Debtor becoming creditor's representative	88
Advantage gained by fiduciary	89
Advantage gained by exercise of undue influence	90
Advantage gained by qualified owner	91
Property acquired with notice of existing contract	92
Purchase by person contracting to buy property to be held on trust	93
Advantage secretly gained by one of several compounding creditors	94
Constructive trusts in cases not expressly provided for	95
Obligor's duties, liabilities and disabilities	96
Saving of rights of <i>bona fide</i> purchasers	96

THE SCHEDULE.

ACT No. II of 1882.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Received the assent of the Governor General on the 13th January, 1882.

An Act to define and amend the law relating to Private Trusts and Trustees.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. This Act may be called 'The Indian Trusts Act, 1882': and it shall come into force on the first day of March, 1882.

Short title.
Commence-
ment.
Local
extent.

It extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-Western Provinces and the Panjáb, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the Local Government may from time to time, by notification in the official Gazette, extend it to any other part of British India¹. But nothing herein contained affects the rules of Muhammadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious² or charitable endow-

Savings.

¹ That such a power is valid, see *The Queen v. Burah*, L. R., 5 I. A. 178 (S. C. 4 Cal. 172), per Lord Selborne.

² A suit will lie to compel the heir of the deceased manager of a Hindú temple to make good out of the

property inherited by him the deficiency in the devasthánam funds caused by breach of trust and misappropriation by the deceased, 4 Mad. H. C. 2.

ments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second chapter of this Act applies to trusts created before the said day.

Repeal
of enact-
ments.

2. The Statute and Acts mentioned in the schedule hereto annexed shall, to the extent mentioned in the said schedule, be repealed, in the territories to which this Act for the time being extends.

Interpre-
tation
clause.
'trust':

3. A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another¹, or of another¹ and the owner:

'author
of the
trust':
'trustee':
'benefi-
ciary':
'trust-pro-
perty':
'beneficial
interest':
'instru-
ment of
trust':
'breach of
trust':

the person who reposes or declares the confidence is called the 'author of the trust': the person who accepts the confidence is called the 'trustee': the person for whose benefit the confidence is accepted is called the 'beneficiary': the subject-matter of the trust is called 'trust-property' or 'trust-money': the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust':

'regis-
tered':

a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a 'breach of trust':

'notice.'

and in this Act, unless there be something repugnant in the subject or context, 'registered' means registered under the law for the registration of documents for the time being in force: a person is said to have 'notice' of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229; and all expressions used herein and defined in the Indian Contract Act, 1872², shall be deemed to have the meanings respectively attributed to them by that Act.

Expres-
sions de-
fined in
Act IX
of 1872.

¹ i. e. another 'person,' which includes a corporation (Act I of 1868, supra, p. 487), but not an animal; see *Pettingall v. Pettingall*, 11 L. J., N. S., Ch. 176, where the testator be-

queathed an annuity of £50 in trust for a favourite mare.

² such as 'fraud,' 'coercion,' 'undue influence,' 'consent,' supra, pp. 553, 554, 555.

CHAPTER II.

OF THE CREATION OF TRUSTS.

4. A trust may be created for any lawful purpose¹. The purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent², or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy³.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void⁴.

Explanation.—In this section, the expression ‘law’ includes, where the trust-property is immovable and situate in a foreign country, the law of such country⁵.

Illustrations.

(a) *A* conveys property to *B* in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void⁶.

(b) *A* bequeaths property to *B* in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support *A*’s children. The trust is void.

(c) *A*, while in insolvent circumstances, transfers property to *B* in trust for *A* during his life, and after his death for *B*. *A* is declared an insolvent. The trust for *A* is invalid as against his creditors⁷.

¹ 9 Ben. 377, 394.

² as, for instance, where a debtor creates a trust for payment of his debts, and by an understanding with his trustees is left in possession of the trust-property so as to obtain a fictitious credit.

³ e.g. where the purpose is to create a perpetuity; see 14 Ben. 175.

⁴ *Chapman v. Brown*, 6 Ves. 404. But if the Court can ascertain the

amount which will satisfy the unlawful purpose, the trust will be good for the residue, *Lewin*, p. 107.

⁵ See *Lewin’s Law of Trusts*, 8th ed. pp. 49, 50.

⁶ *Thornton v. Howe*, 31 Beav. 14. But in India a trust for what English lawyers call superstitious purposes (e.g. saying masses for the souls of the dead) may be valid.

⁷ *Lewin*, 8th ed., 77–79.

Trust of
immove-
able
property.

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered¹, or by the will of the author of the trust or of the trustee.

Trust of
moveable
property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

Creation
of trust.

6. Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts² (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee³.

Illustrations.

(a) *A* bequeaths certain property to *B*, 'having the fullest confidence that he will dispose of it for the benefit of' *C*. This creates a trust so far as regards *A* and *C*⁴.

(b) *A* bequeaths certain property to *B*, 'hoping he will continue it in the family.' This does not create a trust, as the beneficiary is not indicated with reasonable certainty⁵.

(c) *A* bequeaths certain property to *B*, requesting him to distribute it amongst such members of *C*'s family as *B* should think

¹ See above, sec. 3. The requirement of registration is an addition to the former rule on the subject, 3 All. 466.

² See L. R., 6 I. A. 161, for a case where a member of a joint family, being qabuliyatdār of a ta'luq in Oudh on behalf of the family, obtained in his own name a sanad of the ta'luq and was deemed, from his acts and declarations, to have consented to hold it in trust for the family.

Where *A*, a Hindū, opened an account in his books in the name of his son *B*, in which money was credited to *B*, this did not make *A* a trustee for *B* of the sums appearing in the account, 9 Bom. 115.

³ That as between Parsis transmutation of possession is unnecessary, see 2

Bom. H. C., O. C. J. 133. As to voluntary declarations of trust under Hindū law, see 4 Mad. H. C. 460. For a case in which a transaction was held to be a trust for the eventual benefit of an absent Hindū, see 7 Bom. H. C., A. C. J. 149.

⁴ Another instance of a precatory trust, 2 All. 55; and see the Specific Relief Act, *infra*, sec. 3, ill. (a). More in Lewin, 130, 131.

⁵ *Harland v. Trigg*, 1 Brown, C. C. 142. So where *A* bequeathed all his property to his widow, 'feeling confident that she will act justly to our children in dividing the same when no longer required by her,' *Mussoorie Bank v. Raynor*, L. R., 9 I. A. 70.

most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty¹.

(d) *A* bequeaths certain property to *B*, desiring him to divide the bulk of it among *C*'s children. This does not create a trust, for the trust-property is not indicated with sufficient certainty².

(e) *A* bequeaths a shop and stock-in-trade to *B*, on condition that he pays *A*'s debts and a legacy to *C*. This is a condition, not a trust for *A*'s creditors and *C*'s.

7. A trust may be created—

(a) by every person⁴ competent to contract, and,

(b) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor⁵;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

9. Every person⁴ capable of holding property may be a beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice⁶ of the trust, a claim inconsistent therewith.

10. Every person⁴ capable of holding property may be a trustee; but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract⁷.

No one is bound to accept a trust⁸.

A trust is accepted by any words or acts⁹ of the trustee indicating with reasonable certainty such acceptance.

¹ *Green v. Marsden*, 1 Drew. 646; and see 9 Mad. 325.

² *Palmer v. Simmonds*, 2 Drew. 221.

³ *Messenger v. Andrews*, 4 Russ. 478. And if *B* accepts he must pay the debts, though they far exceed the property bequeathed to him.

⁴ This includes a corporate body. See the General Clauses Act, supra, p. 487.

⁵ See the Indian Majority Act, IX of 1875.

⁶ Sec. 3, supra.

⁷ *King v. Bellord*, 1 H. & M. 343. ⁸ even though he have promised to accept it, *Doyle v. Blake*, 2 Sch. & Lef. 239.

⁹ Such as signing the trust-deed, or bringing a suit on the footing of the trust, or otherwise proceeding to act in the execution of its duties.

Who may create trusts.

Subject of trust.

Who may be beneficiary. Disclaimer by beneficiary.

Who may be trustee.

No one bound to accept trust. Acceptance of trust.

Disclaimer
of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period¹, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him².

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust³.

Illustrations.

(a) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A*'s will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*⁴.

(b) *A* transfers certain property to *B* in trust to sell it and to pay out of the proceeds *A*'s debts. *B* accepts the trust and sells the property. So far as regards *B*, a trust of the proceeds is created for *A*'s creditors.

(c) *A* bequeaths a l  kh of rupees to *B* upon certain trusts and appoints him his executor. *B* severs the l  kh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust⁵.

¹ The reasonableness of course depends on the circumstances of each case. If a long interval elapses, there will be a presumption that the trust has been accepted.

² The disclaimer may be by word of mouth, *Bingham v. Clannorris*, 2 Moll. 253.

³ *Peppercorn v. Wayman*, 5 De G. & S. 230.

⁴ *Mucklow v. Fuller*, Jac. 198.

⁵ But merely taking the trust deed into his custody until a trustee could be found is not enough, *Evans v. John*, 4 Beav. 35, 37.

In England, if a trustee is, by the same instrument, nominated trustee of two distinct trusts, it is said that he cannot divide them: but if he accept the one he will be taken to have accepted the other, *Lewin*, p. 204.

CHAPTER III.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent¹ of all the beneficiaries² being competent to contract. Trustee to execute trust.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (a) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death³, and (b) in the case of debts not bearing interest, to make such payment without interest.

Illustrations.

(a) *A*, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(b) *A*, a trustee of certain land for *X*, *Y* and *Z*, is authorized to sell the land to *B* for a specified sum. *X*, *Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a less sum. *A* may sell the land accordingly.

(c) *A*, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B*'s request, trust-property to *B*'s husband, *C*, on the security of his bond. *C* becomes insolvent, and *B* requests *A* to make the loan. *A* may refuse to make it⁴.

¹ *Supra*, p. 553.

² The author of the trust when once it has been created cannot modify it: *a fortiori* he cannot defeat

it, 2 Bom. H. C. 133.

³ *Purefoy v. Purefoy*, 1 Vern. 28.

⁴ *Boss v. Godsall*, 1 Y. & C. C. C. 617.

Trustee
to inform
himself
of state
of trust-
property.

12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security¹.

Illustrations.

(a) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay².

(b) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case required³.

Trustee
to protect
title to
trust-
property.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration.

The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered⁴.

Trustee
not to set
up adverse
title.

14. The trustee must not for himself or another set-up or aid any title to the trust-property adverse to the interest of the beneficiary⁵.

Care re-
quired from
trustee.

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not re-

¹ As a general rule, it may be taken that if the security is worth less than two-thirds of the money invested it is 'insufficient,' and that it is 'hazardous' if it is merely personal, or produces a high rate of interest in proportion to its value.

² 4 Moore, I. A. 452, even though

the debt was a loan by the author of the trust on what he deemed a good investment, 5 Ves. 839.

³ 9 Bom. H. C. 333.

⁴ *Macnamara v. Carey*, 1 Ir. Rep., Eq. 9.

⁵ *Lloyd v. Spillet*, 3 P. W. 344.

sponsible for the loss, destruction or deterioration of the trust-property.

Illustrations.

(a) *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust-funds to *B* by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. *A* is not bound to make good the loss¹.

(b) *A*, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, *B*, then in credit. The rents are accordingly paid to *B*, and *A* leaves the money with *B* only till wanted. Before the money is drawn out, *B* becomes insolvent. *A*, having had no reason to believe that *B* was in insolvent circumstances, is not bound to make good the loss².

(c) *A*, a trustee of two debts for *B*, releases one and compounds the other, in good faith, and reasonably believing that it is for *B*'s interest to do so. *A* is not bound to make good any loss caused thereby to *B*³.

(d) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. *A* is bound to make good the loss caused thereby to the beneficiary⁴.

(e) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*⁵.

(f) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums. *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*⁶.

(g) *A* bequeaths certain moneys to *B* and *C* as trustees and authorizes them to continue trust-moneys upon the personal security of a certain firm in which *A* had himself invested them. *A* dies, and a change takes place in the firm. *B* and *C* must not permit the moneys to remain upon the personal security of the new firm⁷.

(h) *A*, a trustee for *B*, allows the trust to be executed solely by his co-trustee, *C*. *C* misapplies the trust-property. *A* is personally answerable for the loss resulting to *B*⁸.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property of a wasting Conversion of perishable property.

¹ Burge, Comm. iii. 967, 968.

² Grant on Bankers, 4th ed. 276.

³ *Blue v. Marshall*, 3 P. W. 381.

⁴ *Ord v. Noel*, 5 Maddock, 440.

⁵ *Mayer v. Murray*, 47 L. J., Ch. 605.

⁶ See *Hobday v. Peters* (No. 3), 28

Beav. 603, where the trustees, having no funds available, were not liable for the loss.

⁷ *Cummins v. Cummins*, 3 Jones & L. 64.

⁸ See *infra*, sec. 26, cl. (b).

nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust¹, to convert the property into property of a permanent and immediately profitable character.

Illustrations.

(a) *A* bequeaths to *B* all his property in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. *A*'s property consists of three leasehold houses, and there is nothing in *A*'s will to show that he intended the houses to be enjoyed in specie. *B* should sell the houses, and invest the proceeds in accordance with section 20.

(b) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and *B* should not sell them.

Trustee
to be
impartial.

17. Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another².

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

Illustration.

A, a trustee for *B*, *C* and *D*, is empowered to choose between several specified modes of investing the trust-property. *A* in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of *B*, *C* and *D*³.

Trustee to
prevent
active
waste.

18. Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act⁴.

Accounts
and in-
formation.

19. A trustee is bound (a) to keep clear and accurate accounts of the trust-property⁵, and (b), at all reasonable times,

¹ if any. See *Morgan v. Morgan*, 14 Beav. 82; *Craig v. Wheeler*, 29 L. J., N. S., Ch. 374, 376.

² *Ellis v. Barker*, 7 Ch. App. 104.

³ *Minet v. Leman*, 7 De G. M. & G. 351; *Dart*, 89.

⁴ Such as, e. g. suing for an injunc-

tion, *Kerr, On Injunctions*, 2nd ed. 79. The trustee is not responsible for suffering permissive waste, *Powys v. Blagrove*, Kay, 495; 4 De G. M. & G. 448, unless of course there is a special clause of management.

⁵ *Springett v. Dashwood*, 2 Giff. 521.

at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property¹.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:—

Investment
of trust-
money.

(a) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland;

(b) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India;

(c) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council;

(d) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a legislature established in British India;

(e) on a first mortgage of immoveable property situate in British India: Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money²; or

(f) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf.

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (d), (e) and (f) shall be made without his consent in writing.

21. Nothing in section 20 shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immoveable property already pledged as security for an advance under the Land Improvement Act, 1871, or, in case the trust-money does not

Mortgage
of land
pledged to
Govern-
ment under
Act XXVI
of 1871.

¹ *Clarke v. Earl of Ormonde*, Jac. 120.

² *Macleod v. Annesley*, 16 Beav. 600.

Deposit in
Savings
Bank.

exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

Sale by
trustee
directed to
sell within
specified
time.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction¹.

Illustration.

A bequeaths property to *B*, directing him with all convenient speed and within five years to sell it, and apply the proceeds for the benefit of *C*. In the exercise of reasonable discretion, *B* postpones the sale for six years. The sale is not thereby rendered invalid², but *C*, alleging that he has been injured by the postponement, institutes a suit against *B* to obtain compensation. In such suit the burden of proving that *C* has not been injured lies on *B*.

Liability
for breach
of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud³ induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion³ or undue influence³ having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee⁴.

A trustee committing a breach of trust is not liable to pay interest except in the following cases:—

(a) where he has actually received interest:

(b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary:

(c) where the trustee ought to have received interest, but has not done so:

(d) where he may be fairly presumed to have received interest⁵.

He is liable, in case (a), to account for the interest actually received, and, in cases (b), (c) and (d), to account for simple

¹ Dart, i. 58.

² *Pearce v. Gardner*, 10 Hare, 287.

³ *Supra*, pp. 554, 555.

⁴ *Walker v. Symonds*, 3 Swanst. 1. 64.

⁵ as where he has traded with the trust-money, *Penny v. Avison*, 3 Jur. N. S. 62.

interest at the rate of six per cent. per annum, unless the Court otherwise directs ¹.

(e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate ².

(f) Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

Illustrations.

(a) A trustee improperly leaves trust-property outstanding, and it is consequently lost: he is liable to make good the property lost, but he is not liable to pay interest thereon ³.

(b) A bequeaths a house to B in trust to sell it and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated and its market-price falls. B is answerable to C for the loss ⁴.

(c) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(d) The duty of the trustee is to invest trust-money in any of the securities mentioned in section 20, clause (a), (b), (c) or (d). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon ⁵.

(e) The instrument of trust directs the trustee to invest trust-money either in any of such securities or on mortgage of immovable property. The trustee does neither. He is liable for the principal money and interest.

(f) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of

¹ *Atty. Gen. v. Alford*, 4 De G. M. & G. 851, 852: *Vyse v. Foster*, L. R., 8 Ch. App. 333.

² *Raphael v. Boehm*, 11 Ves. 92, and see *Re Emmet's Estate*, 17 Ch. D. 142.

³ 4 Moo. I. A. 452.

⁴ *Devaynes v. Robinson*, 24 Beav. 86: and see *Sculthorpe v. Tipper*, L. R., 13 Eq. 232.

⁵ See *Robinson v. Robinson*, 1 De G. M. & G. 256.

such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends ¹.

(g) Trust-property is invested in one of the securities mentioned in section 20, clause (a), (b), (c) or (d). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(h) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest ².

No set-off
allowed to
trustee.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust ³.

Prede-
cessor's
default.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

Co-trustee's
default.

26. Subject to the provisions of sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee ⁴:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust ⁵, a trustee is so liable—

(a) where he has delivered trust-property to his co-trustee without seeing to its proper application :

(b) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require :

(c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

¹ See *Pride v. Fooks*, 2 Beav. 430.

² Compare the Specific Relief Act, sec. 12, ill. (a), which is repealed wherever the Trusts Act is in force.

³ *Wiles v. Gresham*, 2 Drew. 258, 272.

⁴ Lewin, 263.

⁵ See *Wilkins v. Hogg*, 3 Giff. 116. That a Hindú trustee, who, having

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same¹ is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee. Joining in receipt for conformity.

Illustration.

A bequeaths certain property to B and C, and directs them to sell it and invest the proceeds for the benefit of D. B and C accordingly sell the property, and the purchase-money is received by B and retained in his hands. C pays no attention to the matter for two years and then calls on B to make the investment. B is unable to do so, becomes insolvent, and the purchase-money is lost. C may be compelled to make good the amount².

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach³. Several Liability of co-trustees.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute⁴. Contribution as between co-trustees.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution⁵.

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered. Non-liability of trustee paying without notice of transfer.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication to Government, the trustee is bound to hold the trust-property to the extent of such interest for the Liability where beneficiary's interest is forfeited.

accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee, see 9 Bom. H. C. 333.

¹ *Brice v. Stokes*, 11 Ves. 319. In the absence of all evidence the effect of a joint receipt is to charge each of

the trustees *in solido*, Lewin, 265.

² *Bone v. Cook*, McCl. 168.

³ *Wilson v. Moore*, 1 My. & K. 146.

⁴ *Lockhart v. Reilly*, 1 De G. & J. 476-478.

⁵ *Lingard v. Bromley*, 1 V. & B. 114, 117.

benefit of such person in such manner as the Government may direct in this behalf¹.

Indemnity
of trustees.

30. Subject to the provisions of the instrument of trust and of sections 23 and 26, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses².

¹ In this section the expressions 'the Government' and 'Government' would doubtless be construed with

reference to the Penal Code, sec. 17, supra, p. 94.

² Act XXVIII of 1866, sec. 37.

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property¹. Custody of title-deeds.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust², or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary. Right to reimbursement of expenses.

If he pays such expenses out of his own pocket he³ has a first charge upon the trust-property⁴ for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest⁵.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses⁶.

Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest⁷. Right to be recouped for erroneous over-payment.

¹ But the beneficiary is entitled to inspect &c. these documents, sec. 57. Where there are more trustees than one they may commit the custody to one of themselves; see *Cottam v. Eastern Counties Ry. Co.*, 1 J. & H. 243.

² such as travelling expenses, costs of an attorney or surveyor, fees to counsel, salary of a rent-collector. This right exists even where the

author of the trust has given the trustee specific remuneration for his services in the trust, *Wilkinson v. Wilkinson*, 2 S. & S. 237.

³ not persons employed by him.

⁴ income as well as corpus.

⁵ Otherwise the trust itself might be destroyed, *Darke v. Williamson*, 25 Beav. 622.

⁶ *Balsh v. Hyham*, 2 P. W. 453.

⁷ *Livesey v. Livesey*, 3 Russ. 287.

entitled to recover from the beneficiary personally the amount of such over-payment.

Right to indemnity from gainer by breach of trust.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach¹; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

Right to apply to Court for opinion in management of trust-property.

34. Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property² other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal³.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made⁴.

Right to settlement of accounts.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect⁵.

¹ Lewin, 910.

² such as the investment of trust funds, paying debts, granting leases, and exercising powers to sell, maintain, or advance.

³ such as the laying out a particular sum on improvements (*Re Barrington's Settlement*, 1 J. & H. 142), or doubtful points the decision of which

would materially affect the rights of the parties interested, *Re Lorens' Settlement*, 1 Drew. & Sm. 401.

⁴ Act XXVIII of 1866, sec. 43. Taken from 22 & 23 Vic. c. 35, s. 30.

⁵ But a receipt in full of all claims extends only to all claims that are then known, *Eaves v. Hickson*, 30 Beav. 142.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of section 17, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property¹, and for the protection or support of a beneficiary who is not competent to contract. General authority of trustee.

Every trustee in the actual possession or receipt of the rents and profits of land as defined in the Land Improvement Act, 1871, shall, for the purposes of that Act, be deemed to be a landlord in possession.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs². Power to sell in lots, and either by auction or private contract.

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby³. Power to sell under special conditions. Power to buy-in and re-sell.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion⁴ as to the time of effecting the sale or purchase. Time allowed for selling trust-property.

Illustrations.

(a) *A* bequeaths property to *B*, directing him to sell it with all convenient speed and pay the proceeds to *C*. This does not render an immediate sale imperative.

¹ This would include making repairs and thinning timber.

² Act XXVIII of 1866, sec. 2, extended to moveables. See now in

England, 44 & 45 Vic. c. 41, sec. 35.

³ Act XXVIII of 1866, sec. 3.

⁴ See *infra*, sec. 49.

(b) *A* bequeaths property to *B*, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of *C*. This does not authorize *B*, as between him and *C*, to postpone the sale to an indefinite period.

Power to convey.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary¹.

Power to vary investments.

40. A trustee may, at his discretion², call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section 20, and from time to time vary any such investments for others of the same nature³.

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing⁴.

Power to apply property of minors etc. for their maintenance, etc.

41. Where any property is held by a trustee in trust for a minor⁵, such trustee may, at his discretion⁶, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property⁷; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen: Provided that

¹ Act XXVIII of 1866, sec. 4.

² See sec. 49, *infra*.

³ Act XXVIII of 1866, sec. 32: *Waite v. Littlewood*, 41 L. J., Ch. 636.

⁴ His consent should precede or accompany the execution of the power. But where an investment has been varied without the required consent, he cannot complain if he has acquiesced in the change, *Stevens v. Robertson*, 37 L. J., Ch. 499.

⁵ Where a fund is given to a

trustee for a minor *contingently* on his attaining majority, followed by a residuary gift, it would seem that there is no property 'held in trust for a minor' within the meaning of this section, *In re Dickson*, 28 Ch. D. 291.

⁶ This power (subject to sec. 49) seems to exist even though a contrary intention is expressed in the instrument of trust. Otherwise in England, *Lewin*, 582.

⁷ 2 Bom. H. C. 139.

such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year¹.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors².

42. Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof³.

43. Two or more trustees acting together may, if and as they think fit—

(a) accept any composition or any security for any debt or for any property claimed;

(b) allow any time for payment of any debt;

(c) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust; and,

(d) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting

¹ Act XXVIII of 1866, sec. 33.

² See, for instance, Act XIII of

1874, secs. 11-18.

³ Act XXVIII of 1866, sec. 36.

trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof¹.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force².

Power to
several
trustees of
whom one
disclaims
or dies.

44. When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees³, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Suspension
of trustee's
powers by
decree.

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the appellate Court⁴.

¹ 4 Moo. I. A. 452, where an implied trustee of a debt was held entitled to bind the beneficiary by a proper compromise.

² Cf. 44 & 45 Vic. c. 41, sec. 37. The object of the section is not to enable some of the trustees to act without the concurrence of their co-trustees. All the trustees, therefore, must act together, except in cases where, independently of the section, a

majority are by law capable of binding the minority, Lewin, p. 591.

³ *Adams v. Taunton*, 5 Maddock, 435.

⁴ *Mitchelson v. Piper*, 8 Sim. 64, where Shadwell V.C. held that executors could not be allowed payments to creditors made after a decree for administering the debtor's estate. See Lewin, 597.

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

46. A trustee who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of original jurisdiction, or (b), if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust ¹. Trustee cannot renounce after acceptance.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee ² or to a stranger, unless (a) the instrument of trust so provides ³, or (b) the delegation is in the regular course of business ⁴, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation. Trustee cannot delegate.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section ⁵.

Illustrations.

(a) *A* bequeaths certain property to *B* and *C* on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. *B* dies. *C* may bequeath the trust-property to *D* and *E* upon the trusts of *A*'s will ⁶.

(b) *A* is a trustee of certain property with power to sell the same. *A* may employ an auctioneer to effect the sale.

(c) *A* bequeaths to *B* fifty houses let at monthly rents in trust to collect the rents and pay them to *C*. *B* may employ a proper person to collect these rents.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides ⁷. Co-trustees cannot act singly.

49. Where a discretionary power conferred ⁸ on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction ⁹. Control of discretionary power.

¹ Lewin, 251.

² *Crewe v. Dicken*, 4 Ves. 97.

³ *Kilbee v. Sneyd*, 2 Moll. 199, 200; *Wilkins v. Hogg*, 3 Giff. 116.

⁴ *In re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1.

⁵ *Atty. Gen. v. Scott*, 1 Ves. Sen. 413.

⁶ *Tidley v. Wolstenholme*, 7 Beav. 436.

⁷ Lewin, 258. The rule is otherwise in the case of public trusts, where the act of the majority is held to be the act of the whole number.

⁸ whether by the instrument of trust or by this Act, secs. 38, 40, 41, 43.

⁹ *In re Hodges*, 7 Chan. D. 754. The

Trustee
may not
charge for
services.

50. In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust ¹.

Nothing in this section applies to any Official Trustee ², Administrator General ³, Public Curator ⁴, or person holding a certificate of administration ⁵.

Trustee
may not
use trust-
funds for
own profit.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust ⁶.

Trustee for
sale or his
agent may
not buy.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

Trustee
may not
buy bene-
ficiary's
interest
without
permission.

53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee ⁷ of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

Trustee for
purchase.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

Co-trustees
may not
lend to one
of them-
selves.

54. A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one ⁸ of his co-trustees.

power to control where the trustee's conduct is not *bond fide* would exist even though the instrument of trust purported to confer an absolute discretion. Of course, where the power is coupled with a duty and meant to be exercised, the Court will either compel execution or execute in place of the trustee, *Tempest v. Lord Camoys*, 21 Ch. D. 576.

¹ 6 Beng. 278, where a distinction was drawn between a trustee and a director.

² See Act XVII of 1864, Act II

of 1874, secs. 9, 73, and *infra*, sec. 73.

³ See Act II of 1874.

⁴ Act XIX of 1841, sec. 19: Act XL of 1858, secs. 10, 16-24: Act XX of 1864, secs. 9, 16-24; Act XXV of 1858, sec. 9.

⁵ Act II of 1874, secs. 36-38.

⁶ If he does so use the property, a constructive trust arises; see *infra*, sec. 88.

⁷ *Passingham v. Sherborn*, 9 Beav. 424: *Lewin*, 486.

⁸ or more, *v. Walker*, 5 Russ. 7.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property. Rights to rents and profits.

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest¹; Right to specific execution.

and, when there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct². Right to transfer of possession.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage³.

Illustrations.

(a) Certain Government securities are given to trustees upon trust to accumulate the interest until *A* attains the age of 24, and then to transfer the gross amount to him. *A* on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(b) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority and is otherwise competent to contract. *B* may claim the Rs. 10,000.

(c) *A* transfers certain property to *B* and directs him to sell or invest it for the benefit of *C*, who is competent to contract. *C* may elect to take the property in its original character.

¹ See the Specific Relief Act, *infra*, sec. 12, cl. (a).

² 3 Ben. A. C. J. 409: 3 Ben. O. C. J. 92. And where the trustee unreasonably delays to transfer the trust-property he is liable to the costs of a suit to compel him to do so, 11

Cal. 628, where however he was allowed the costs of and attending the necessary conveyance.

³ By no device whatever can the restraint upon anticipation be evaded, *Stanley v. Stanley*, 7 Ch. D. 589.

Right to inspect and take copies of instrument of trust, accounts, etc.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty¹.

Right to transfer beneficial interest.

58. The beneficiary, if competent to contract, may transfer his interest², but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest :

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

Right to sue for execution of trust.

59. Where no trustees are appointed or all the trustees die, disclaim or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court³ until the appointment of a trustee or new trustee.

Right to proper trustees.

60. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper⁴ persons and by a proper number of such persons⁵.

Explanation I.—The following are not proper persons within the meaning of this section :—

A person domiciled abroad : an alien enemy⁶ : a person having an interest inconsistent with that of the beneficiary : a

¹ See *Ex p. Holdsworth*, 4 Bing. N. C. 386 (where the trustee of a marriage settlement was ordered to deliver the draft of it to the husband) : Lewin, 680.

² i.e. his right against the trustee as owner of the trust-property, sec. 3, supra, p. 838.

³ This does not include a Presidency

Small Cause Court, Act XV of 1882, sec. 19 (k).

⁴ This does not mean (at least in case of charities) 'the most proper,' *Lancaster Charities*, 7 Jur., N.S. 96.

⁵ Lewin, 846.

⁶ An alien *friend* may be appointed under special circumstances, Lewin, 1330, note.

person in insolvent circumstances¹; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor².

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations.

(a) *A*, one of several beneficiaries, proves that *B*, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from *B*'s being in insolvent circumstances, or that he is incapacitated from acting as trustee. *A* may obtain a receiver of the trust-property³.

(b) *A* bequeaths certain jewels to *B* in trust for *C*. *B* dies during *A*'s lifetime; then *A* dies. *C* is entitled to have the property conveyed to a trustee for him⁴.

(c) *A* conveys certain property to four trustees in trust for *B*. Three of the trustees die. *B* may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(d) *A* conveys certain property to three trustees in trust for *B*. All the trustees disclaim. *B* may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(e) *A*, a trustee for *B*, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. *B* may institute a suit to have *A* removed and a new trustee appointed in his room.

61. The beneficiary has a right that his trustee shall be Right to compelled to perform any particular act of his duty as such, compel to and restrained from committing any contemplated or probable of duty. breach of trust.

Illustrations.

(a) *A* contracts with *B* to pay him monthly Rs. 100 for the benefit of *C*. *B* writes and signs a letter declaring that he will hold in trust for *C* the money so to be paid. *A* fails to pay the money in accordance with his contract. *C* may compel *B* on a proper indemnity to allow *C* to sue on the contract in *B*'s name.

¹ *In re Barker's Trusts*, 1 Ch. D. 43.

² Where there are co-beneficiaries, one of them should not be appointed trustee, if this can be avoided, *Ex p. Clutton*, 17 Jur. 988.

³ *Scott v. Becher*, 4 Price, 346, where an administrator was insolvent. Other instances in which a receiver will be

granted at the instance of a beneficiary are when the trustee has been guilty of waste of the trust-property, or has an undue bias towards one of the beneficiaries, or is a person of bad character. See the Specific Relief Act, *infra*, sec. 54, cl. (a).

⁴ *Brown v. Higgs*, 8 Ves. 570.

(b) *A* is trustee of certain land, with a power to sell the same and pay the proceeds to *B* and *C* equally. *A* is about to make an improvident sale of the land. *B* may sue on behalf of himself and *C* for injunction to restrain *A* from making the sale¹.

Wrongful
purchase
by trustee.

62. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice² of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (a) account for the nett profits of the property, (b) be charged with an occupation-rent, if he has been in actual possession of the property, and (c) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(a) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or

(b) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

Following
trust pro-
perty—
into the
hands of
third
persons;
into that
into which
it has been
converted.

63. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust³.

Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative

¹ See Act I of 1877, sec. 54, ill. (f).

² *Supra*, sec. 3.

³ 6 Bom. H. C., O. C. J. 59: *Pennell v. Deffell*, 4 D. M. G. 372.

or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations.

(a) *A*, a trustee for *B* of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. *B* is entitled to the land.

(b) *A*, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for *B*. *B* is entitled to a charge on the land for the amount of the trust-money so misemployed.

64. Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

(a) a transferee in good faith for consideration without having notice of the trust¹, either when the purchase-money was paid, or when the conveyance was executed, or—

(b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section².

Nothing in section 63 applies to money, currency notes and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred³.

65. Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration⁴.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him⁵.

¹ *Suth.* 1864, p. 225: 5 *Suth. Civ. R.* 120. If he has notice (as defined in sec. 3) he is bound by the trust to the same extent and in the same manner as the transferor, 6 *Bom. H. C.*, *O. C. J.* 59.

² So in England the beneficiary is protected from a judgment against the trustee, *Lewin*, 224, 245.

³ See the Transfer of Property Act, sec. 137, *supra*, p. 814.

⁴ *Kennedy v. Daly*, 1 *Sch. & Lef.* 379.

⁵ In England he is 'entitled to every portion of the trust-property which the trustee cannot prove to be his own,' *Lewin*, 298, 894. When two or more trust-funds are intermixed

Wrongful employment by partner-trustee of trust-property for partnership purposes.

67. If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust¹.

Illustrations.

(a) *A* and *B* are partners. *A* dies, having bequeathed all his property to *B* in trust for *Z*, and appointed *B* his sole executor. *B*, instead of winding-up the affairs of the partnership, retains all the assets in the business. *Z* may compel him, as partner, to account for so much of the profits as are derived from *A*'s share of the capital. *B* is also answerable to *Z* for the improper employment of *A*'s assets.

(b) *A*, a trader, bequeaths his property to *B* in trust for *C*, appoints *B* his sole executor, and dies. *B* enters into partnership with *X* and *Y* in the same trade, and employs *A*'s assets in the partnership-business. *B* gives an indemnity to *X* and *Y* against the claims of *C*. Here *X* and *Y* are jointly liable with *B* to *C* as having knowingly become parties to the breach of trust committed by *B*².

Liability of beneficiary joining in breach of trust.

68. Where one of several beneficiaries—

(a) joins in committing a breach of trust, or

(b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(d) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him³ (otherwise than as transferees for consideration without

and dealt with as a common fund, the profits are apportioned between the beneficiaries in the proportions to which they were originally entitled to the common fund, see *Provost of Edinburgh v. Lord Advocate*, 4 App. Cas. 823, a charity case.

¹ Compare *Lewin*, 902, 913, *Pollock on Partnership*, § 25.

² *Flockton v. Bunning*, 8 L. R., Ch. App. 323, note: *Pollock*, Ptp. p. 90.

³ This includes his assignees, judgment creditors, and general creditors.

notice of the breach) until the loss caused by the breach has been compensated ¹.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage ².

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer ³.

Rights and liabilities of beneficiary's transferee.

¹ *Raby v. Ridehalgh*, 7 D. M. & G. 109, and cases cited by Lewin, 8th ed. p. 911.

² See *Stanley v. Stanley*, 7 Ch. Div. 589.

³ As between assignor and assignee of immoveable property, notice to the trustee is not necessary, though it should always be given, Lewin, 74, 701, 702. Otherwise where the pro-

perty is moveable, see the Transfer of Property Act, sec. 131, supra, p. 813. After notice of the assignment, though it be by way of mortgage only (Lewin, 345), the trustee cannot safely pay either principal or interest to the assignor, unless perhaps in the case mentioned in the Transfer of Property Act, sec. 133.

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated. **70.** The office of a trustee is vacated by his death or by his discharge from his office.

Discharge of trustee. **71.** A trustee may be discharged from his office only as follows :—

- (a) by the extinction of the trust ;
- (b) by the completion of his duties under the trust ;
- (c) by such means as may be prescribed by the instrument of trust¹ ;
- (d) by appointment under this Act of a new trustee in his place ;
- (e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract², or
- (f) by the Court to which a petition for his discharge is presented under this Act³.

Petition to be discharged from trust. **72.** Notwithstanding the provisions of section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office ; and if the Court finds that there is sufficient reason for such discharge⁴, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place⁵.

Appointment of new **73.** Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a

¹ Lewin, 646.

² Lewin, 645. Where all or any of the beneficiaries are unborn the trustee cannot be discharged under this clause.

³ Lewin, 670.

⁴ As to capricious retirement, see

Forshaw v. Higginson, 20 Beav. 485. The costs in such cases are borne by the trustee himself.

⁵ He may, however, relieve himself by submitting the administration of the trusts to the jurisdiction of the Court.

continuous period of six months absent from British India, ^{trustees on death, etc.} or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses ¹ or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit ² or personally incapable ³ to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) the person nominated for that purpose by the instrument of trust (if any), or

(b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract ⁴, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee ⁵.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased ⁶.

The Official Trustee ⁷ may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

74. Whenever any such vacancy or disqualification occurs ^{Appointment by Court.} and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit,

¹ whether before or after having acted.

² *Re Roche*, 2 Dr. & W. 287 (bankruptcy).

³ *Re Bignold's Settlement Trusts*, 7 Ch. App. 223.

⁴ See 5 Ben. 181, 184.

⁵ When the Court is administering the trust the donee of the power must

obtain the Court's approval of the person proposed, *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

⁶ whether or not a contrary intention is expressed by the instrument of trust.

⁷ appointed under Act XVII of 1864.

apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

Rule for selecting new trustees.

In appointing new trustees, the Court shall have regard (a) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust¹; (b) to the wishes of the person, if any, empowered to appoint new trustees²; (c) to the question whether the appointment will promote or impede the execution of the trust, and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries³.

Vesting of trust-property in new trustees.

75. Whenever any new trustee is appointed under section 73 or section 74, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee as the case may require⁴.

Powers of new trustees.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Survival of trust.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

¹ If (*e.g.*) he has declared *A* not fit to be appointed a trustee the Court will not appoint *A*, Lewin, 850.

² *Middleton v. Reay*, 7 Hare, 106.

³ *In re Tempest*, L. R., 1 Ch. Ap. 485, and see sec. 17, *supra*.

The Act is silent as to severing a trusteeship. In England, under 45 & 46 Vic. c. 39, sec. 5, on an appointment of new trustees, a separate trustee or set of trustees may be appointed for any part of the trust property held on trusts distinct from

those relating to any other part. This is in accordance with a decision of Fry J. (*In re Grange*, 29 W. R. 502), which the Indian Courts would, no doubt, follow.

⁴ And no conveyance or assignment is necessary. Compare the English Conveyancing Act, 1881, sec. 34, which does not apply to land mortgaged to secure trust-money, or to shares etc. only transferable in books kept by a company.

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

77. A trust is extinguished—

Trust
how ex-
tinguished.

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or
- (d) when the trust, being revocable, is expressly revoked¹.

78. A trust created by will may be revoked at the pleasure of the testator.

Revocation
of trust.

A trust otherwise created can be revoked only—

- (a) where all the beneficiaries are competent to contract—by their consent²;
- (b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust³; or
- (c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors⁴—at the pleasure of the author of the trust⁵.

Illustration.

A conveys property to *B* in trust to sell the same and pay out of the proceeds the claims of *A*'s creditors. *A* reserves no power of revocation. If no communication has been made to the creditors, *A* may revoke the trust⁶. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust⁷.

Revocation
not to de-
feat what
trustees
have duly
done.

¹ *Frith v. Cartland*, 34 L. J., Ch. 801.

² See 2 Botm. H. C. 139.

³ So under the Shia law, N. W. P. 1870, p. 420.

⁴ *Johns v. James*, 8 Ch. Div. 744.

⁵ Here the trustees are mere mandatories, and the deed confers no

right on the creditors who are neither parties nor privies, *Lewin*, §16. The creditors cannot enforce the trust after the author's death, *Garrard v. Lord Lauderdale*, 3 Sim. 1.

⁶ *Wilding v. Richards*, 1 Coll. 655, 659.

⁷ *Ryeroft v. Christie*, 3 Beav. 238.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where such obligation created.

Where it does not appear that transferor intended to dispose of beneficial interest.

80. An obligation in the nature of a trust is created in the following cases.

81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative¹.

Illustrations.

(a) *A* conveys land to *B* without consideration² and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the land. *B* holds the land for the benefit of *A*.

(b) *A* conveys to *B* two fields, *Y* and *Z*, and declares a trust of *Y*, but says nothing about *Z*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in *Z*. *B* holds *Z* for the benefit of *A*³.

(c) *A* transfers certain stock belonging to him into the joint names of himself and *B*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the stock during his life. *A* and *B* hold the stock for the benefit of *A* during his life.

(d) *A* makes a gift of certain land to his wife *B*. She takes the beneficial interest in the land free from any trust in favour of *A*, for it may be inferred from the circumstances that the gift was for *B*'s benefit⁴.

Transfer to one for

82. Where property⁵ is transferred to one person for a consideration paid or provided by another person, and it appears

¹ Lewin, 143.

² or for a merely nominal one.

³ *Northen v. Carnegie*, 4 Drew. 587,

593.

⁴ *Christ's Hospital v. Budgin*, 2 Vern. 683, where a husband lent money on mortgage in the names of

himself and his wife. So if *A* invests a sum in the names of the trustees of his marriage settlement, *Re Curteis' Trust*, L. R., 14 Eq. 217.

⁵ whether moveable or immoveable, Lewin, 163.

that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration¹.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (*to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency*), section 36.

83. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative².

Trust incapable of execution or executed without exhausting trust-property.

Illustrations.

(a) *A* conveys certain land to *B*—

‘upon trust,’ and no trust is declared; or

‘upon trust to be thereafter declared,’ and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect; or

‘in trust for *C*,’ and *C* renounces his interest under the trust.

In each of these cases *B* holds the land for the benefit of *A*³.

(b) *A* transfers Rs. 10,000 in the four per cents. to *B*, in trust to pay the interest annually accruing due to *C* for her life. *A* dies. Then *C* dies. *B* holds the fund for the benefit of *A*’s legal representative.

(c) *A* conveys land to *B* upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. *B* sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. *B* holds the first moiety and the part unapplied of the second moiety for the benefit of *A* or his legal representative⁴.

(d) *A* bequeaths Rs. 10,000 to *B*, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail

¹ 6 Moore, I. A. 53. *A* and his son *B*, two Hindus, live together as an undivided family. *B* buys a house with funds forming part of the family property, and has it transferred to himself. There is nothing to show that *A* intended that the purchase should be made for the sole benefit of *B*. *B* holds the house for the benefit of *A* and himself, *Suth.*

1864, Civ. R. 103. The presumption that the property is joint is not rebutted by the mere fact of the purchase in *B*’s name.

² 2 Bom. 410. *Cooke v. Stationers Co.*, 3 My. & K. 264, 265.

³ See *Lewin*, 148, for the cases from which these illustrations are taken.

⁴ Here the English rule (*Lewin*, 161, 162) is intentionally departed from.

to take effect. *B* holds for the benefit of *A*'s legal representative the undisposed of interest in the money or land if purchased ¹.

Transfer
for illegal
purpose.

84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor ².

Bequest
for illegal
purpose.

85. Where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative ³.

Bequest
of which
revocation
is pre-
vented.

Where property is bequeathed and the revocation of the bequest is prevented by coercion ⁴, the legatee must hold the property for the benefit of the testator's legal representative.

Transfer
pursuant to
rescindable
contract.

86. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

Debtor
becoming
creditor's
represent-
ative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein ⁵.

Advantage
gained by
fiduciary.

88. Where a trustee ⁶, executor ⁷, partner, agent, director of a company ⁸, legal adviser, or other person bound in a fiduciary character to protect the interests of another person ⁹, by availing himself of his character, gains for himself ¹⁰ any pecuniary

¹ *Cogan v. Stephens*, 5 L. J., N. S., Ch. 17.

² See *Symes v. Hughes*, L. R., 9 Eq. 475; *Lewin*, 106.

³ *Cases in Lewin*, 63, note (b).

⁴ *Contract Act*, sec. 15.

⁵ *Freakley v. Fox*, 9 B. & C. 134; *Ingle v. Richards*, 28 Beav. 366.

⁶ *Lewin*, 180-187.

⁷ This includes an executor of his own wrong (*supra*, p. 458), *Mulvany v. Dillon*, 1 Ball & B. 409.

⁸ That directors are in the position of trustees, see 9 Bom. 373 and the

cases cited pp. 393, 394. They are liable to be sued for a breach of trust in case they have not dealt with the property of the company and watched over its business as carefully as a man of ordinary prudence would deal with such property, and watch over such business, if they were his own, *ibid.* 394, per Scott J. As to the distinction between directors and trustees, see 6 Ben. 282, per Phear J.

⁹ *Hobday v. Peters*, 6 Jur. N. S. 794.

¹⁰ or for himself and some person jointly with him, L. R., 2 I. A. 18.

advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained ¹.

Illustrations.

(a) *A*, an executor, buys at an undervalue from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.

(b) *A*, a trustee, uses the trust-property for the purpose of his own business. *A* holds for the benefit of his beneficiary the profits arising from such user.

(c) *A*, a trustee, retires from his trust in consideration of his successor paying him a sum of money. *A* holds such money for the benefit of his beneficiary.

(d) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.

(e) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lăkh of rupees. *A* holds the lăkh for the benefit of the partnership ².

(f) *A* and *B* are partners. *A* dies. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A*'s legal representative for the profits arising from *A*'s share of the capital.

(g) *A*, an agent employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.

(h) *A*, a guardian, buys up for himself incumbrances on his ward *B*'s estate at an undervalue. *A* holds for the benefit of *B* the incumbrances so bought, and can only charge him with what he has actually paid ³.

89. Where, by the exercise of undue influence ⁴, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced ⁵.

Advantage gained by exercise of undue influence.

¹ In *L. R. 4 I. A. 84* the Judicial Committee thought that a custom permitting the sale of a trusteeship for the pecuniary advantage of the trustee would be bad in law. See *Sugden v. Crossland*, 3 Sm. & G. 192.

² *Fawcett v. Whitehouse*, 1 R. & M. 132.

³ *Powell v. Glover*, 3 P. W. 251 n.

⁴ Contract Act, sec. 16.

⁵ *Maitland v. Irving*, 15 Sim. 43. See the Specific Relief Act, *infra*, sec. 3, ill. (b).

Advantage
gained by
qualified
owner.

90. Where a tenant for life, co-owner, mortgagee¹ or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage².

Illustrations.

(a) *A*, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease³.

(b) A village belongs to a Hindú family. *A*, one of its members, pays nazrána to Government and thereby procures his name to be entered as the inámdár of the village. *A* holds the village for the benefit of himself and the other members.

(c) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*⁴.

Property
acquired
with notice
of existing
contract.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract⁵.

¹ Where a mortgagee, in execution of a simple decree for money, the repayment of which is secured by mortgage, attaches and sells the mortgagor's right to redeem, and purchases that right himself, he holds the right as a trustee for the mortgagor, 5 Ben. 450, 460. That a mortgagee is not a constructive trustee for the mortgagor of his power of sale (*supra*, p. 782), see *Warner v. Jacob*, 20 Ch. Div. 220.

² Where the interest acquired by the qualified owner is distinct from, and not in substitution of, the property, see *Randall v. Russell*, 3 Mer. 190.

³ *Eyre v. Dolphin*, 2 B. & B. 290.

⁴ *A* and *B*, jointly entitled to a moiety of a certain shop, were transported for life. *C* and *D*, the owners of the other moiety, thereupon fraudulently took possession of *A* and *B*'s moiety, and held it by themselves or their assignees. *B* was pardoned and returned (*A* having died). The High Court ruled that *C* and *D* had taken possession for the benefit of *A* and *B*, and that *B* was entitled as against the mortgagee to assert his right, 2 All. 361, 365.

⁵ See Act I of 1877, sec. 3, illustrations (g), (h). See, too, sec. 96, *infra*.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Purchase by person contracting to buy property to be held on trust.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Advantage secretly gained by compounding creditors.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands¹.

Constructive trusts in cases not expressly provided for.

Illustrations.

(a) *A*, an executor, distributes the assets of his testator *B* to the legatees without having paid the whole of *B*'s debts. The legatees hold for the benefit of *B*'s creditors, to the extent necessary to satisfy their just demands, the assets so distributed².

(b) *A* by mistake assumes the character of a trustee for *B*, and under colour of the trust receives certain money. *B* may compel him to account for such moneys³.

(c) *A* makes a gift of a lākh of rupees to *B*, reserving to himself, with *B*'s assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000⁴, and *B* holds that sum for the benefit of *A*⁵.

¹ 7 All. 25. Sec. 94 would include the case of the widow or some other member of the family of a missing person having possession of his estate, 2 Agra, Civ. Court Ap. 78. It would also seem to include the case of a wrongful invasion or continuance in possession of a stranger, whether with or without knowledge of the infirmity of his title. In such case, however, the Madras High Court held that the wrongdoer was not a constructive trustee unless he had been admitted into possession by a trustee so as to be affected by the trust, 5 Mad. 91, 105. Sec. 94 would include the case of a Hindū executor who, by the

will, is made an express trustee for certain purposes, and who is as to the undisposed residue a constructive trustee for the testator's heirs, 2 Bom. 388. It would also apparently cover that form of constructive trust which the Panjāb courts have held to arise when a co-sharer in a village community absents himself without expressly abandoning his rights.

² Wms. Exors., 8th ed. 1457, 1458.

³ *Rackham v. Siddall*, 16 Sim. 297; 1 Mac. & G. 607.

⁴ See the Transfer of Property Act, sec. 126, *supra*, p. 811.

⁵ As to the case of an absent co-sharer, see 3 All. 458.

Obligor's
duties,
liabilities,
and dis-
abilities.

95. The person holding property in accordance with any of the preceding sections of this chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it :

Provided that (a) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment¹; and (b) where he holds the property by virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof².

Saving of
rights of
bond fide
purchasers.

96. Nothing contained in this chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force³.

THE SCHEDULE.

STATUTE.

Year and chapter.	Short title.	Extent of repeal.
29 th Car. II, c. 3	The Statute of Frauds	Sections 7, 8, 9, 10, and 11.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Short title.	Extent of repeal.
XXVIII of 1866	The Trustees' and Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, and 37. In sections 39 and 43 the word 'trustee' wherever it occurs; and in section 43 the words 'management or' and 'the trust-property or.'
I of 1877 . .	The Specific Relief Act, 1877.	In section 12 the first illustration.

¹ *Brown v. Litton*, 1 P. W. 140, 142.

² *Knight v. Marjoribanks*, 2 M. & G. 10 (purchase by mortgagee from

mortgagor): *Chambers v. Howell*, 11 Beav. 6 (purchase by surviving partners of deceased partner's share).

³ *Lewin*, 166.

INTRODUCTION TO THE EASEMENTS ACT.

THIS Act, though as yet in force only in the Presidency of Madras, Coorg, and the Central Provinces, is intended to form part of the Indian Civil Code, and attempts to state, clearly and compactly, the rules relating to Easements or Servitudes, that is to say, the rights which a man may have over one house or piece of land by reason of his ownership of another. As to these rights the Indian statutory law was silent, except so far as regarded the acquisition of easements by long and continued possession, the limitation of suits for disturbing them, and the granting of injunctions to prevent such disturbance; and three of the most experienced Indian judges — Sir Michael Westropp, Mr. Justice (now Sir Louis) Jackson, and Mr. Justice Innes — had expressed their opinion that it was desirable to codify the law on the subject, which was then (to quote the Chief Justice of Bombay) ‘for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal profession in the Mufassal and to the subordinate Judges.’ There was much litigation in the case of urban easements, and Mr. Elmslie, one of the Judges in the Panjáb Chief Court, asserted that this was largely due to the facts that neither the people themselves, nor the majority of the Courts, understood the principles upon which such disputes should be determined. As to rural servitudes, it was stated by Mr. Crosthwaite, the present Chief Commissioner of the Central Provinces, that ‘those who had served as Settlement officers in the North-West, and especially in Rohilkhand, would, he thought, support him in saying that the peasantry generally had been deprived of their ancient rights of pasturage, and the like, by the inability of the Courts to understand how one man could possess a right of any sort over land which belonged to another¹.’ And Sayyad Ahmad Khán said that the right to take fish or water from lakes or tanks often becomes the subject of litigation, and the final decision materially affects the value of the property in regard to which the easements are claimed².

The Act is mainly based on the law of England, which, being just, equitable, and almost free from local peculiarities, had, in

¹ Abstract of the Proceedings of Council, etc., 9th Feb. 1882, p. 111.

² Ibid., p. 107.

many cases¹, been held to regulate the subject in India; but a few deviations (hereinafter specified) have been made from that law, and rules as to some matters which have not hitherto been settled by the English or Indian Courts have been adapted from the writings of modern jurists.

EASEMENTS GENERALLY.

Definition
of Easement.

The Act is divided into five chapters. The first chapter treats of easements generally: and opens with a definition of the term, so framed as to exclude all rights in gross, i.e. those which are not annexed to the ownership of immoveable property. The definition also indicates that the easement must be in a corporeal heritage, and that the servient owner can only be required not to do something or to suffer something to be done. The definition also requires that the easement must be of some advantage to the dominant heritage. Such advantage, it is explained, may be contingent or remote, and even a mere amenity. But there cannot, for instance, be an easement that A shall not go over a particular part of his own field, or that he shall not search for water on his own land. The heritages need not adjoin, or even be near, each other, the Act here intentionally varying from Roman and English law².

Profits à
prendre.

An explanation declares in effect that there may be an easement entitling the dominant owner to remove and appropriate for his own use, as such, any part of the soil of the servient heritage or anything growing or subsisting thereon. This, though in conformity with continental systems of jurisprudence, is in contravention of the English law, which reckons, for instance, as an easement, the right to take water from a spring on your neighbour's land, but denies that name to a right to take gravel or grass. 'It has been said,' to quote Mr. Markby, 'that the distinction is that the first is for convenience only, while the latter is for

¹ See, for example, in Bombay, *Calliandoss v. Cleveland*, 2 Ind. Jur. O. S. 16; *Ratanji H. Bottlewala v. Edalji H. Bottlewala*, 8 Bom. 181. In Calcutta, *Modhoooodhun Dey v. Bissonath Dey*, 15 Ben. 361; *Bhuban Mohan Banerjee v. Elliot*, 6 Ben. 85; *Bagram v. Kettranath Karformah*, 3 Ben. O. C. J. 18. In the Mufassal, *Krishna Ayyan v. Vencatachella Mudali*, 7 Mad. 60; *Ponnusami Tevar v. Collector of Madura*, 5 Mad. 6, 23, 34. Mr. Justice Field in a minute

on the Bill mentioned about seventy other cases relating to easements which are to be found in the Indian law-reports from 1862 to 1882. That both the Hindú and the Mahammadan law recognised rights resembling easements, see 3 Ben. O. C. J. 37, 38, per Norman J.

² The late Sir E. C. Bayley informed the writer that he knew of an easement to graze cattle in which the dominant was situate more than a hundred miles from the servient heritage.

profit. -But this, besides being a very slender distinction, is not always observed. The right to take water is just as much an easement if the water be made into beer, and sold by the person who takes it, as if it be used by himself for domestic purposes.'

Sections 5 and 6 define, in accordance with English law, easements continuous and discontinuous, apparent and non-apparent. There is no definition of easements 'affirmative' (as in the case of a right of way, *ius faciendi aliquid in alieno*) or 'negative' (as in the case of a right to light, *ius prohibendi aliquid in alieno*); for these terms do not occur in the Act.

Kinds of easements.

Section 7 declares that all easements are restrictions of one or other of certain rights incidental to the ownership of immoveable property. These rights are, shortly, (1) the exclusive right of the owner to enjoy and dispose of the property and its products, and (2) his right to enjoy, without disturbance, the natural advantages arising from its situation. Both these rights are, of course, subject to any law for the time being in force. Illustrations show that they include the right to build on one's land in a town; the right to the enjoyment of air unpolluted; the right of house-owners that their physical comfort shall not be interfered with by noise or vibration: the right to the vertical passage of light and air; to the natural support of land by the soil of another; to the enjoyment of water unpolluted; to drain; to the uninterrupted flow of water naturally flowing in defined channels; to discharge surface-water on lower adjoining land; and, lastly, to use the water of a stream for drinking, household purposes, watering cattle, and, *sub modo*, for irrigation and manufactures. The section is so drawn in order not to negative any other 'natural right' (as, for example, a right to lateral access of light or air, or to the non-diminution of a supply of fish), should such be shown to exist in any part of India, and not to exclude an easement in derogation of such right.

Exclusive right to enjoy.
Natural rights.

Illustration (d) to section 5 shows that an easement to restrain interference with privacy is recognised by the Act, and is a negative easement. Such an easement, founded as it is on the oriental custom of secluding females, is of much importance in India. It is recognised generally by the countries whose system is founded on the Civil Law¹, and the Law Commissioners of 1879 thought that the decisions of the Indian High Courts adverse to such a right should not be followed by the legislature.

Privacy.

IMPOSITION, ACQUISITION, AND TRANSFER OF EASEMENTS.

Chapter II treats of the imposition, acquisition, and transfer

¹ As, for example, Scotland, Bell, *Principles*, § 1006.

of easements. Sections 8, 9, 10, and 11 treat of the persons capable of constituting easements, whether permanent or temporary. Provision is made for the cases of lessees, co-owners, trustees, servient owners, lessors, and mortgagors. The Act (here following a decision of the Madras High Court, but deviating from English law) does not require the express imposition of an easement to be evidenced by writing. The Act then shows who may acquire easements, allowing one of several co-owners to acquire, without the consent of the others, an easement for the benefit of the property held in co-ownership, but forbidding the lessee of any immoveable property to acquire, for the benefit of other immoveable property of his own, an easement in or over the property comprised in his lease. Nothing is said of the acquisition of an easement by estoppel of the servient owner, as, for instance, when a person having no right to certain land purports to impose an easement upon it, and afterwards acquires the land. This matter seems sufficiently provided for by the Evidence Act.

Easements
of neces-
sity.

Ways of
necessity.

Sections 13 and 14 deal with easements of necessity, meaning thereby not only the rights which are absolutely necessary for enjoying property, but also apparent and continuous easements necessary for enjoying property as it was enjoyed when it was separated by grant or bequest. When the person entitled to set out a way of necessity refuses or neglects to do so, the Act empowers the dominant owner to set it out. There is no provision that such a way cannot be varied save with the consent of both dominant and servient owners, or unless the servient owner renders it impassable. Such a provision was thought opposed to Indian rural economy and convenience. The periodical fallows of parts of the same land, the sowing and growing of crops at different times, and the great temporary changes arising from the extremes of wet and dry weather make a strict adherence to the same road in all seasons often impossible.

In England, where a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect thereon any buildings he pleases, however much they may interfere with the light coming to the vendor's windows. The Act deviates from this doctrine, which seems to rest on a doubtful dictum of Lord Holt's, and of which a late Vice-Chancellor says (2 Drew. & Sm. 360) that if carried to an extreme, it 'would, in some cases, produce great and startling injustice.'

Acquisi-
tion by

The Act then deals with the important subject of the acquisition

of easements by long and continued possession. Sections 15 and 16 ^{prescription.} correspond to sections 26 and 27 of the Indian Limitation Act, 1877, but with the omission of the words 'as of right' in the paragraph relating to negative easements and the addition of a provision that a prescriptive right to support may, by user for twenty ^{Right to support.} years, be acquired for land with things affixed thereto, and of an explanation that suspension of the enjoyment of an easement in pursuance of a contract between the dominant and servient owners is not such an interruption as will defeat a claim by prescription. The result of omitting the words 'as of right' is that actual enjoyment of light, air or support for twenty years without interruption, thus gives an absolute right¹, unless, of course, the right is limited by agreement. When the heritage over which a right is claimed belongs to Government the prescriptive period is sixty, instead of twenty, years. This is the period fixed in the Limitation Act for suits brought by the Secretary of State in Council. Section 17 sets forth the limits to the acquisition of prescriptive rights. It agrees with the present law and its English prototype (when the user has continued for forty years) in making no provision for cases in which the servient owner is ignorant of the user or has been incapable of resisting it. The Act also provides, in accordance with a decision of the House of Lords, that a right tending to the destruction of the servient heritage cannot be acquired by prescription. Section 18 abolishes prescription at common law, which has been held to exist in the Presidency towns².

As an easement exists only for the beneficial enjoyment of a certain thing, it cannot be separated from that thing. Section 19, taken from the Transfer of Property Act, accordingly declares that the transfer of a dominant heritage passes the easement, unless a contrary intention appears.

INCIDENTS OF EASEMENTS.

Chapter III deals with the user, the extent, and other incidents of easements. The rules which it contains are expressly made subject to contract and the provisions of any instrument or of a decree by which an easement is imposed. As an easement exists ^{User of} only for the benefit of a certain heritage, it can be exercised only ^{easements.} in the interest of that heritage and to supply its wants. Section

¹ So in England as to light under 2 & 3 Wm. IV. c. 71, s. 3.

² 3 Ben. O. C. J. 18, per Markby J.

DISTURBANCE OF EASEMENTS.

Chapter IV, on the disturbance of easements, after describing the general right to undisturbed enjoyment, proceeds (sec. 33) to provide that the owner of any interest in the dominant heritage, or the occupier of the heritage, may sue for a disturbance if it has caused him substantial damage. Such damage includes the doing of any act likely to injure the plaintiff by affecting the evidence of the easement or by materially diminishing the value of the dominant heritage. As the law stands both in England and in India, a suit will lie for the disturbance of a right to light where the obstruction interferes materially with the comfort of the plaintiff. But in the case of a right to air, where there is no express contract on the subject, the obstruction, to be actionable, must amount to a nuisance (3 Ben. O. C. J. 45). It would seem that in a country like India, the right to air is entitled to at least as much favour as the right to light, and that we should not in this respect follow a law fashioned upon the wants of the inhabitants of a northern country (15 Ben. 367, 368). The Act accordingly allows a suit for the obstruction of the free passage of air where it interferes materially with the plaintiff's physical comfort, although it is not injurious to his health. Right to air.

The period at which the cause of action arises when a right of support is disturbed is declared, by section 34, in accordance with the decision in *Bonomi v. Backhouse*, and the Indian Limitation Act, 1877, sec. 24, to be when the damage is sustained.

Cases of polluting air, and rules as to injunctions to restrain disturbances, are added by section 35 to those contained in the Specific Relief Act.

In section 36, the right to abate a wrongful obstruction of light, air, or water is disallowed. This, though a deviation from English law, will avoid the risk of riot and trespass, and is a step taken in the direction in which all modern systems of law have tended, of forbidding private persons to redress their grievances by their own act. There is, it seems, a contrary usage in the Sialkot District, but this will be saved by sec. 2, cl. (c).

EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

Chapter V deals with the extinction, suspension, and revival of easements. It first states eleven cases in which an easement may be extinguished, as follows:—

- (a) by dissolution, *ex causâ antiquâ et necessariâ*, of the right of the person who imposed the easement (sec. 37);
- (b) by release or surrender, *remissio* (sec. 38);

(c) by revocation (sec. 39);

(d) by expiration of the time for which the easement was imposed or the happening of the dissolving condition annexed thereto (section 40);

(e) in the case of an easement of necessity, when the necessity ends (section 41);

(f) when the easement becomes incapable of being under any circumstances beneficial (section 42);

(g) by alteration of the dominant heritage (section 43), except in the case of an easement of support;

(h) by alteration of the servient heritage (section 44);

(i) by destruction of either heritage (section 45);

(j) by unity of ownership, merger, *confusio* (section 46);

(k) by non-user, *non-utendo* (section 47).

In most of these cases the reason for extinction is obvious. Three, however, may need explanation. Useless restrictions of the rights of property are to be avoided, and section 42 consequently declares that an easement which, under no circumstances, can be advantageous to the dominant heritage shall cease to exist. Every easement is a right which the dominant owner would not require if he were also owner of the servient heritage. Section 46 therefore declares that an easement is extinguished when the same person becomes entitled to the absolute ownership of the *whole* of the dominant and servient heritages. If the owner of a servitude acquires only a part of the land burdened with the servitude, or the owner of the land burdened acquires only a portion of the dominant land, the servitude is not extinguished, although it could not have been so created¹.

Extinctive
prescription.

The section (47) treating of extinctive prescription, *i.e.* the extinction by non-user of prescriptive rights and other easements, requires fuller notice. As in the case of acquisition by prescription, the Act does not assume that a fictitious grant has been made by the servient owner, so here the Act rejects the doctrine that non-user is to be regarded merely as evidence from which a release may be implied. Rules on this difficult subject are contained in section 47. Some of them were suggested by the Digest, 8, 2, 6; others by Sintenis, *Das practische gemeine Civilrecht*.

The Act here draws a distinction between a continuous and a discontinuous easement, and in the case of the latter enables the dominant owner to keep it alive by registering a declaration of his intention to retain it.

¹ Hunter's *Roman Law*, 2nd edit. 414, citing Dig. 8, 1, 8, 1: Dig. 50, 17, 85, 1.

It will be seen that the same period is fixed for the loss of an easement by non-user as for its original acquisition by enjoyment¹; that this method of extinction is not confined (as seems to be the case in America) to prescriptive rights; and that no exception is made when the exercise of the easement has been prevented by force or by the theft of its subject. There is in such cases a *de facto* interruption of the dominant owner's quasi-possession, even though he is unaware of the obstruction or ignorant of his right. Where the dominant owner exercises, during the prescriptive period, a right less extensive than that to which he is entitled, some systems lay down that his easement shall be reduced to the right actually exercised. The Act omits all provisions on this head, partly because they are inconsistent with the indivisible nature of an easement, partly because they would obviously encourage litigation.

Nothing is said of the extinction of an easement by decree of Court², or of extinction by estoppel of the dominant owner, as this matter seems sufficiently provided for by the Evidence Act.

The extinction of rights accessory to easements is provided for by section 48. Extinction
of accessory
rights.

The suspension of easements by unity of possession is then dealt with by section 49. Suspension by encroachment is not recognised by the Act. Suspension.

Section 50 negatives any right of the servient owner to require that an easement should continue. But the dominant owner ought not to be allowed to damage the servient tenement by suddenly or maliciously abandoning or suspending the easement. The Act therefore declares that the servient owner is not entitled to compensation for damage caused by its extinguishment or suspension if the dominant owner has given him such notice as will enable him, without unreasonable expense, to protect the servient heritage. This excellent provision was suggested by Sir C. Turner, late Chief Justice of Madras.

Lastly, section 51 deals with the revival of extinguished and suspended easements, and provides, not only for the common case of a house pulled down for the purpose of re-building, but also for that of a diluviated heritage restored by alluvion. Similar provisions exist in Roman law; see Dig. 8, 2, 20, 2, and 8, 16, 14, pr. Revival of
easements.

¹ It was held by the High Court at Fort William, that a right of way was lost by non-user for *six* years, 5 Ben. Appendix 66. In *Ward v. Ward*

(7 Exch. 838), on the other hand, such a right was held to survive a non-user for more than twenty years.

² Pothier, *Œuvres*, ed. Bugnet, i. 318.

SAVINGS.

Irrigation. The Act saves (section 2) any right of the Government to regulate the distribution of the waters of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation. This is in accordance with Act VIII of 1873, sec. 32, cl. (f). The power of the Executive to carry out schemes of irrigation, so important in a country like India¹, will thus remain unhampered. The Act also saves all enactments not expressly repealed, such, for example, as the Forest Act, and, in the Panjáb, Act IV of 1872, sec. 7, and in Oudh, Act XVIII of 1876, sec. 4.

Forest-conservancy. It thus avoids interference with forest-conservancy and with local usage in those parts of India in which customary law prevails. It also *ex abundanti cautela*, saves any customary or other right (not being a license) over land which any person may possess irrespective of any other land. Such rights, when conferred by license, are dealt with by Chapter VI.

LICENSES.

Licenses. The Act ends with a chapter on Licenses, which, though mentioned in the Evidence Act, secs. 116, 117, were nowhere dealt with in the body of Indian codified law. It defines 'license' as a grant of a right to do in or upon the grantor's immoveable property something which would in the absence of such right be unlawful, such right not amounting to an easement or an interest in the property²; declares who may grant licenses; states when alone they are transferable (herein varying from *Wood v. Ledbitter*, 13 M. & W. 838), declares the grantor's duties and rights, and the licensee's rights on revocation and on eviction.

History of the Act. The Bill which became the Easements Act was drawn by the writer, circulated in 1878, and again in 1879, to the Local Governments, revised by the Indian Law Commission, introduced (with the permission of the Secretary of State) to the Council and referred to a Select Committee in June 1881, and passed, in a somewhat mutilated condition, in February 1882. It has worked well during the last five years among the forty millions to whom it applies, and has falsified the predictions that it would give rise to litigation.

¹ See Mr. Justice Innes' *Digest of the English Law of Easements*, 3rd ed. Pref. viii.

² The grant of a rill in Dig. 8, 3, 37 seems an instance in Roman law of what English lawyers call a license.

THE INDIAN EASEMENTS ACT, 1882.

CONTENTS.

PREAMBLE.

PRELIMINARY.

	SECTION
Short Title	I
Local extent	ib.
Commencement	ib.
Savings	2
Repeal of Act XV of 1877, sections 26 and 27	3

CHAPTER I.

OF EASEMENTS GENERALLY.

'Easement' defined	4
Dominant and servient heritages and owners	ib.
Continuous and discontinuous, apparent and non-apparent, easements	5
Easement for limited time or on condition	6
Easements restrictive of certain rights	7
(a) Exclusive right to enjoy	ib.
(b) Rights to advantages arising from situation	ib.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

Who may impose easements	8
Servient owners	9
Lessor and mortgagor	10
Lessee	11
Who may acquire easements	12
Easements of necessity and <i>quasi</i> -easements	13
Direction of way of necessity	14
Acquisition by prescription	15
Exclusion in favour of reversioner of servient heritage	16
Right which cannot be acquired by prescription	17
Customary easements	18
Transfer of dominant heritage passes easement	19

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

	SECTION
Rules controlled by contract or title	20
Incidents of customary easements	ib.
Bar to use unconnected with enjoyment	21
Exercise of easement	22
Confinement of exercise of easement	ib.
Right to alter mode of enjoyment	23
Right to do acts to secure enjoyment	24
Accessory rights	ib.
Liability for expenses necessary for preservation of easement	25
Liability for damage from want of repair	26
Servient owner not bound to do anything	27
Extent of easements	28
Easement of necessity	ib.
Other easements—	
(a) right of way;	ib.
(b) right to light or air acquired by grant;	ib.
(c) prescriptive right to light or air;	ib.
(d) prescriptive right to pollute air and water;	ib.
(e) other prescriptive rights	ib.
Increase of easement	29
Partition of dominant heritage	30
Obstruction in case of excessive user	31

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance	32
Suit for disturbance of easement	33
When cause of action arises for removal of support	34
Injunction to restrain disturbance	35
Abatement of obstruction of easement	36

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

Extinction by dissolution of right of servient owner	37
Extinction by release	38
Extinction by revocation	39
Extinction on expiration of limited period or happening of dissolving condition	40
Extinction on termination of necessity	41
Extinction of useless easement	42
Extinction by permanent change in dominant heritage	43
Extinction on permanent alteration of servient heritage by superior force	44

CONTENTS.

891

	SECTION
Extinction by destruction of either heritage	45
Extinction by unity of ownership	46
Extinction by non-enjoyment	47
Extinction of accessory rights	48
Suspension of easement	49
Servient owner not entitled to require continuance	50
Compensation for damage caused by extinguishment	ib.
Revival of easements	51

CHAPTER VI.

LICENSESES.

'License' defined	52
Who may grant license	53
Grant may be express or implied	54
Accessory licenses annexed by law	55
License when transferable	56
Grantor's duty to disclose defects	57
Grantor's duty not to render property unsafe	58
Grantor's transferee not bound by license	59
License when revocable	60
Revocation express or implied	61
License when deemed revoked	62
Licensee's rights on revocation	63
Licensee's rights on eviction	64

ACT No. V. OF 1882.

PASSED BY THE GOVERNOR GENERAL OF
INDIA IN COUNCIL.

(Received the assent of the Governor General on the 17th February,
1882.)

*An Act to define and amend the law relating to
Easements and Licenses.*

Preamble. Whereas it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

PRELIMINARY.

Short title. 1. This Act may be called 'The Indian Easements Act, 1882.'

Local extent. It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg;

Commencement. and it shall come into force on the first day of July, 1882.

Savings. 2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(a) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds¹, or of the water flowing, collected, retained or distributed in or

¹ The Act is silent as to pools (*stagna*), or natural collections of rain-water, sometimes dried up.

by any channel or other work constructed at the public expense for irrigation¹;

(b) any customary or other right (not being a license²) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of 'easement' contained in that Act, are repealed in the territories to which this Act extends. All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections 15 and 16 of this Act.

Repeal of
Act XV
of 1877,
sections
26 and 27.

¹ As to the rights saved by this clause see 7 Mad. H. C. 60: 7 Bom. 211. That an easement in the flow of water through an artificial water-course may

be asserted against the Government as against a private owner of land, see 5 Mad. H. C. 6.

² See *infra*, chap. vi.

CHAPTER I.

OF EASEMENTS GENERALLY.

'Easement' defined.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land ¹, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own ².

Dominant and servient heritages and owners.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses of this section, the expression 'land' includes also things permanently attached to the earth ³: the expression 'beneficial enjoyment' includes also possible convenience, remote advantage, and even a mere amenity; and the expression 'to do something' includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations.

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement ⁴.

(b) A, as the owner of a certain house, has the right to go on

¹ Gale, 12.

² The two lands must belong to different persons. Where they become the property of the same persons, see sec. 46 *infra*.

³ Such as houses. But it does not include an incorporeal hereditament. Under this Act, therefore, if the owner of a right to take certain minerals

under close Y obtains a grant from the owner of an adjacent close Z of a way over Z as appurtenant to the right of mining, this would not create an easement. See Gale, 9, 10.

⁴ So there may be a right of passing over (*ius navigandi*) a natural lake belonging to another person to one's own land or house.

his neighbour *B*'s land, and to take water for the purposes of his household out of a spring therein. This is an easement¹.

(c) *A*, as the owner of a certain house, has the right to conduct water from *B*'s stream to supply the fountains in the garden attached to the house. This is an easement².

(d) *A*, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on *B*'s field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of *C*'s tank³, or timber out of *D*'s wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on *E*'s land. These are easements⁴.

(e) *A* dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement⁵.

(f) *A* is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of *B*, a lower riparian owner. This is not an easement⁶.

5. Easements are either continuous or discontinuous, ap-
parent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign⁷.

¹ *aquas haustus*: see *Race v. Ward*, 4 E. & B. 702.

² Though here the beneficial enjoyment is a mere amenity. The right is called *aquae ductus*.

³ An exclusive right to take fish out of certain tidal waters may be acquired by such enjoyment as would suffice for the acquisition of an easement against the Crown, 8 Mad. 467: and see *Suth. 1864*, Civ. R. 243.

⁴ Similar servitudes recognised by Roman law are the right of burning lime, or of digging sand, on a neighbour's land. Other easements which have been recognised by the Indian Courts are the easement to compel one to receive upon his roof the rain-water dropping or flowing from the dominant owner's roof (*atitlicidit vol fluminis recipiendit*), 3 Bom. 174, and see

Hamilton's *Hedaya*, iv. 146: the easement of one set of villagers to embark and disembark passengers on the landing-place in the village of another set, 6 Cal. 613.

⁵ Because it is not annexed to a dominant heritage. See *Rangeley v. Midland Ry. Co.*, L. R., 3 Ch. App. 310, per Lord Cairns L.J. It is what English lawyers call 'a right in gross,' like a private right of way not annexed to a dominant heritage. That a leaseholder cannot dedicate a right of way to the public for a term of years was held in *Wood v. Veal*, 5 B. & Ald. 454: but see 11 Ch. Div. 327.

⁶ If the duty is annexed to *A*'s land it is a *reallast*; see *infra*, sec. 27.

⁷ Code Civil, arts 688, 689, from which these definitions are taken; Gale on Easements, 5th ed. p. 25.

Continuous
and discontin-
uous,
apparent
and non-
apparent,
easements.

Illustrations.

(a) A right annexed to *B*'s house to receive light by the windows without obstruction by his neighbour *A*. This is a continuous easement.

(b) A right of way annexed to *A*'s house over *B*'s land. This is a discontinuous easement.

(c) Rights annexed to *A*'s land to lead water thither across *B*'s land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d) A right annexed to *A*'s house to prevent *B* from building on his own land. This is a non-apparent easement.

Easement
for limited
time or on
condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times¹, or between certain hours, or for a particular purpose², or on condition³ that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easements
restrictive
of certain
rights.

Exclusive
right to
enjoy.

7. Easements are restrictions of one or other of the following rights (namely):—

(a) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Rights to
advantages
arising from
situation.

(b) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the Rights above referred to.

(a) The exclusive right of every owner of land in a town to build on such land⁴, subject to any municipal law for the time being in force.

¹ For example, an easement for *A* to pass and repass during the annual rains, in boats, over *B*'s land, 1 *Suth. Civ. R.* 218, col. 1, or when the crops are off the land. So the right of drawing water from a neighbour's well may be confined to certain hours, or a right of leading water may be confined to the hot season (*aqua aestiva*), or a

right of passage may be confined to a part of the day or to a certain place, *Kent, Comm.*, 13th ed., iii. 436.

² e.g. for agricultural purposes only.

³ *Roberts v. Davey*, 1 *Nev. & Mann.* 443 (the case of a license).

⁴ 2 *N. W. P.* 1870, pp. 169, 182.

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons¹. Purity of air.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person². Freedom from noise.

(d) The right of every owner of land to so much light and air as pass vertically³ thereto⁴. Quantity of air.

(e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person. Support.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the 'subjacent and adjacent soil' mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition⁵.

(f) The right of every owner of land that, within his own limits, the water which naturally⁶ passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons⁷. Purity of water.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel⁸. Underground water.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel⁹ shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature¹⁰; Flow of natural streams.

¹ Goddard, 44.

² This right was recognised by the High Court N. W. P. in an unreported case, *Mahadeo Misser v. Phaikoo Singh*, No. 1143 of 1878, 28th Nov. 1878.

³ The owner of a house cannot by prescription claim to be entitled to the free lateral passage of a current of wind, 2 Hyde, 125.

⁴ Gale, 319. The corresponding easement, to construct balconies or eaves over another's land, is called *ius prociendi*.

⁵ *Mayor of Birmingham v. Allen*, 46 L. J., Ch. 673. See *Dalton v. Angus*, L. R., 6 App. Ca. 740; *Lemaitre v. Davis*, 19 Ch. Div. 281. It would not, apparently, be lawful for the servient owner to substitute artificial props for the natural means of support. Secus in England according to Goddard, 52, 53.

⁶ There is no such natural right in connexion with artificial streams, Goddard, 303.

⁷ *Womersley v. Church*, 17 L. T., N.S. 190, explained in 26 Chan. Div. 204; *Wood v. Waud*, 3 Exch. 748; *Hodgkinson v. Ennor*, 4 B. & S. 229. *Ballard v. Tomlinson*, 26 Ch. Div. 194. As to subterraneous channels, see *Acton v. Blundell*, 12 M. & W. 324. ⁸ 1 Mad. 335; Marshall, 506; *Popplewell v. Hodgkinson*, L. R., 4 Ex. 248; Kent, Comm. iii. 440, note. This right may be qualified or limited by the right mentioned in (h), Goddard, 89.

⁹ L. R., 6 I. A. 33; 4 Cal. 637 (P.C.). The right to water flowing to a man's land through an artificial watercourse constructed on his neighbour's land must rest on some grant or arrangement, either proved or presumed, from or with the owners of the land from which the water is artificially brought, or on some other legal origin, *ibid.*, and see 6 Suth. Civ. R. 99.

¹⁰ The right to the enjoyment of the water of a river belongs to the

the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature¹.

Flow to lower land. (i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto².

Right to take water for use. (j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners³.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course⁴.

occupant of the river-bank whatever the nature of his tenancy, 7 Bom. 209.

¹ 3 Suth. Civ. R. 218: 13 *ibid.* 48: 18 *ibid.* 525: *Miner v. Gilmour*, 12 Moore, P.C. 156: Goddard, 79. That it is in England actionable to heat the water of a natural stream see *Mason v. Hill*, 5 B. & Ad. 1, 26, per Denman C.J.: Gale, 260.

² 8 Cal. 468, following *Smith v. Kenrick*, 7 C. B. 515; and see 7 Suth. Civ. R. 498, per Markby J.: Suth. F.B. 25: 20 Suth. 287: 1 Mad. 335: 12 Cal. 326. The owner of lower land has no corresponding right that water naturally rising in, or falling on, adjacent upper land, and not passing in defined channels, shall be allowed to run naturally to the lower land, Suth. 1864, Civ. R. 147: Marshall, 506: 20 Suth. Civ. R. 287.

³ 11 Suth. 254.

⁴ Compare the English rules as to these rights codified by Mr. Monahan, *The Method of Law*, 1878, pp. 193-198. The Act is designedly silent as to rights to passage of fish. In a case reported in Suth. 1864, Civ. R. 275, the Court seemed to recognise a right in Bengal of every owner of land that in every natural stream which passes by &c. his land in a defined natural channel, fish shall be allowed by other persons to go within his limits without obstruction. See *Weld v. Hornby*, 7 East, 195, where the defendant had converted a weir of brushwood through which fish might pass, into one of stone, which barred escape, except in times of flood.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed¹. Who may impose easements.

Illustrations.

(a) *A* is tenant of *B*'s land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. *A* may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(b) *A* is tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B*'s consent, impose an easement thereon which will continue after the determination of his life-interest.

(c) *A*, *B* and *C* are co-owners of certain land. *A* cannot, without the consent of *B* and *C*, impose an easement on the land or on any part thereof².

(d) *A* and *B* are lessees of the same lessor, *A* of a field *X* for a term of five years, and *B* of a field *Y* for a term of ten years. *A*'s interest under his lease is transferable; *B*'s is not. *A* may impose on *X*, in favour of *B*, a right of way terminable with *A*'s lease.

9. Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility. Servient owners.

Illustrations.

(a) *A* has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B*'s stream. *B* may grant to *C* the right to divert the water of the stream

¹ No instrument in writing is required.

² See Kent, Comm. 13th ed., iii. 436. Of course a company or any

other corporation cannot impose an easement where to do so would be *ultra vires*, *Mulliner v. Midland Ry. Co.*, 11 Ch. D. 611.

from noon to sunset: provided that *A*'s supply is not thereby diminished.

(b) *A* has, in respect of his house, a right of way over *B*'s land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that *A*'s right of way is not thereby obstructed.

Lessor and mortgagor.

10. Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Who may acquire easements.

12. An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property¹.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease².

Easements of necessity and quasi easements.

13. Where one person transfers or bequeaths immovable property to another,—

¹ See *Large v. Pitt*, Peake, Add. Ca. 152, as to the incapacity of one tenant of *A* to acquire an easement

over the holding of another tenant of *A*. But see *infra*, p. 907, note 1.

² 7 Mad. H. C. 64.

(a) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous¹ and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement²; or

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous³ and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement⁴.

Where a partition is made of the joint property of several persons⁵,—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

¹ See sec. 5, *supra*.

² 2 Mad. 46: 8 Bom. H. C., O. C. J. 181. As to the disposition of the owner of two tenements (*destination du père de famille*), see 8 Cal. 959: Gale, 97.

There is a distinction between discontinuous and continuous easements in regard to the circumstances in which they will be held to pass. A grant of a discontinuous easement (not being an easement of necessity)

cannot be implied from the disposition of the severed tenements, and will not pass under a grant or lease of land without express words showing an intention to pass it along with the land, 2 Mad. 52.

³ See sec. 5, *supra*.

⁴ See *Wheeldon v. Burrows*, 12 Ch. Div. 31 (S. C. 48 L. J., Ch. 853). As to the result of this and other English decisions, see Goddard, 172.

⁵ 8 Bom. H. C. 181.

The easements mentioned in this section, clauses (a), (c), and (e), are called easements of necessity¹.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(a) *A* sells *B* a field then used for agricultural purposes only. It is inaccessible except by passing over *A*'s adjoining land or by trespassing on the land of a stranger. *B* is entitled to a right of way, for agricultural purposes only, over *A*'s adjoining land to the field sold.

(b) *A*, the owner of two fields, sells one to *B*, and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over *B*'s field to the field retained.

(c) *A* sells *B* a house with windows overlooking *A*'s land, which *A* retains. The light which passes over *A*'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on his land².

(d) *A* sells *B* a house with windows overlooking *A*'s land. The light passing over *A*'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards *A* sells the land to *C*. Here *C* cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in *A*'s hands³.

(e) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* simultaneously sells the house to *B* and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build so as to obstruct such light⁴.

(f) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A*, retaining the house, sells the land to *B*, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. *A* is entitled to the light, and *B* cannot build on the land so as to obstruct such light⁵.

¹ As to these see *infra*, secs. 14, 41, 47 and 51, and *Gale*, 131.

² *Coutts v. Gorham*, Moo. & Mal. 396.

³ See *Robinson v. Grave*, 21 W.R. 223.

⁴ Compare *Barnes v. Loach*, 4 Q. B. Div. 494 (S. C. 48, L. J., Q. B., 756).

⁵ Otherwise in England, *White v. Bass*, 7 H. & N. 722.

(g) *A*, the owner of a house, sells *B* a factory built on adjoining land. *B* is entitled, as against *A*, to pollute the air, when necessary, with smoke and vapours from the factory.

(h) *A*, the owner of two adjoining houses, *Y* and *Z*, sells *Y* to *B*, and retains *Z*. *B* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y* as it was enjoyed when the sale took effect, and *A* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale took effect.

(i) *A*, the owner of two adjoining buildings, sells one to *B*, retaining the other. *B* is entitled to a right to lateral support from *A*'s building, and *A* is entitled to a right to lateral support from *B*'s building.

(j) *A*, the owner of two adjoining buildings, sells one to *B*, and the other to *C*. *C* is entitled to lateral support from *B*'s building, and *B* is entitled to lateral support from *C*'s building.

(k) *A* grants land to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A*'s land as is necessary for the safety of the house.

(l) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of *B*'s land for the purpose of making a siding. The Company is entitled to such amount of lateral support from *B*'s adjoining land as is essential for the safety of the siding¹.

(m) Owing to the partition of joint property, *A* becomes the owner of an upper room in a building, and *B* becomes the owner of a portion of the building immediately beneath it. *A* is entitled to such amount of vertical support from *B*'s portion as is essential for the safety of the upper room.

(n) *A* lets a house and grounds to *B* for a particular business. *B* has no access to them other than by crossing *A*'s land. *B* is entitled to a right of way over that land suitable to the business to be carried on by *B* in the house and grounds.

14. When right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out².

¹ *Elliot v. N.E. Ry. Co.*, 10 H. L. Ca. 356, per Lord Chelmsford.

There can only be one way of necessity, *Goddard*, 317.

² *Gale*, 148, 575; *Goddard*, 377-9.

Acquisition
by pre-
scription.

15. Where the access and use of light or air¹ to and for any building have been peaceably² enjoyed³ therewith, as an easement⁴, without interruption, and for twenty years⁵,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement⁴, without interruption⁶, and for twenty years⁷,

and where a right of way or any other easement has been peaceably² and openly⁸ enjoyed³ by any person claiming title thereto, as an easement⁴, and as of right⁹, without interruption, and for twenty years,

the right to such access and use of light or air¹, support or other easement shall be absolute¹⁰.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested¹¹.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an ease-

¹ That there cannot be in England a prescriptive right to free access of air see *Bryant v. Lefever*, 4 C. P. D. 172, following *Webb v. Bird*, 13 C. P., N. S. 841.

² Gale, 209.

³ See Expl. I.

⁴ *Onley v. Gardiner*, 4 M. & W. 500.

⁵ The Act does not here say 'as of right,' because every person has a right to so much light as can come in at his windows. See *Truscott v. Merchant Tailors' Co.*, 11 Exch. 864, per Creswell J.

⁶ See Explanations II and III.

⁷ See *Angus v. Dalton*, L. R., 3 Q. B. D. 85: on appeal, 6 App. Ca. 740: *Lemaitre v. Davis*, 19 Ch. Div. 281.

⁸ i. e. not exercised by stealth or in the night, Gale, 212.

⁹ Goddard, 227. For an enjoyment to be 'as of right' there must be an adverse exercise of the right as against the servient owner, 15 Beng. 361, per Markby J., and *Tickle v. Brown*,

4 A. & E. 382. Enjoyment under a license from the servient owner will not suffice, Gale, 213.

¹⁰ No custom can be admitted to override these provisions, 3 Bom. 174.

¹¹ This paragraph applies, not to the owner of the servient tenement, but to the claimant of the easement. Although an easement may have been enjoyed for twenty years, and thus the right has become indefeasible by prescription, if its enjoyment has been foregone for a period of two years before suit, the right is lost, N. W. P. 1875, p. 295, per Turner J. It had been said, *obiter*, that a grant of an easement might be presumed from a twelve years' user, 5 Mad. H. C. 6; and in a suit brought in 1878 a right to divert the flow of water into a particular channel by erecting a dam across a stream was established by proof of the exercise of the right for eighteen years prior to 1871; 5 Mad. 253.

ment, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made¹.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage².

When the property over which a right is claimed under this section belongs to Government this section shall be read as if, for the words 'twenty years,' the words 'sixty years' were substituted.

Illustrations:

(a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed 'as an easement' for twenty years.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The

¹ 1 Cal. 430. The interruption intended is an adverse one, not an interruption by unity of possession, *Ladyman v. Grave*, L. R., 6 Chan. App. 768.

² *Goldsmith v. Tunbridg Wells Improvement Commrs.*, L. R., 1 Eq. 161: 1 Ch. App. 349; *Goddard*, 309-312.

defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed 'as of right' for twenty years.

Exclusion
in favour of
reversioner
of servient
heritage.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land ¹.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights
which
cannot be
acquired
by pre-
scription.

17. Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ²;

(b) a right to the free passage of light or air to an open space of ground ³;

(c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise ⁴;

¹ There is no proviso for minority, idiocy, lunacy or other disability.

² 1 Suth. Civ. R. 230, and compare *Dyce v. Lady James Hay*, 1 Macqueen, Sc. Ap. 305, where the easement claimed was so large as to preclude the ordinary use of the property by its owner: Gale, pp. 4 note, 20: Goddard, 325.

³ 2 Hyde, 125: *Roberts v. Macord*, 1 Moo. & Rob. 230.

⁴ A prescriptive right may be acquired to the surplus water of a tank flowing through a channel, whether natural or artificial, 4 Cal. 633, followed in 7 Mad. 534. But a prescriptive right to throw back water and keep it standing on the land of

(d) a right to underground water not passing in a defined channel ¹.

18. An easement may be acquired in virtue of a local custom ². Such easements are called customary easements ³. Customary easements.

Illustrations.

(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house ⁴.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place ⁵. Transfer of dominant heritage passes easement.

Illustration.

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

another exists only in the case of water flowing in a defined stream, and cannot apply to surface-water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank, 7 Mad. H. C. 46, 47, per Innes J.

¹ Goddard, 298. Of course a tenant cannot acquire a prescriptive right in land belonging to his landlord. But he might acquire one in land of his lessor *against another tenant* to whom that land happened to be leased; and such easement would be coextensive with the period during which the tenements were jointly leased, Goddard, 15.

² The custom must of course be

reasonable and certain.

³ Goddard, 26, 110, 242. The right of tin-streamers in Cornwall is an English example of a customary easement.

⁴ As to rights of privacy in India and in France see 5 Ben. 676, 681: 3 Mad. H. C. 141. That they exist in the towns of Gujara't, see 9 Bom. H. C. 266: 8 Bom. H. C., A. C. J. 87: 6 ibid. 143: 5 ibid. 42. And in the N. W. Provinces, see 4 Agra, 253. In England the law does not recognise any right to undisturbed privacy, Goddard, 110.

⁵ Gale, p. 88. See Transfer of Property Act, sec. 6, cl. (c), supra, p. 748.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

Rules controlled by contract or title. **20.** The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements. And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Bar to use unconnected with enjoyment. **21.** An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(a) *A*, as owner of a farm *Y*, has a right of way over *B*'s land to *Y*. Lying beyond *Y*, *A* has another farm *Z*, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of *Y*. He must not use the easement for the purpose of passing to and from *Z*¹.

(b) *A*, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by *A*, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if *A* lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Exercise of easement. **22.** The dominant owner must exercise his right in the mode which is least onerous to the servient owner²; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient

¹ *Lawton v. Ward*, 1 Ld. Raym. 75.
² and where there are several dominant owners, one of them must not use his right so as to obstruct the exercise by the others of their rights,

7 Cal. 674.

The Roman rule that the owner of the servitude *aquae ductus* must, in the absence of a special agreement, lead the water off in pipes (*fistulae*), illustrates this clause.

heritage, such exercise shall, at the request of the servient owner, be so confined ¹.

Illustrations.

(a) *A* has a right of way over *B*'s field. *A* must enter the way at either end and not at any intermediate point ².

(b) *A* has a right annexed to his house to cut thatching-grass in *B*'s swamp. *A*, when exercising his easement, must cut the grass so that the plants may not be destroyed.

23. Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage ³. Right to alter mode of enjoyment.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage ⁴.

Illustrations.

(a) *A*, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(b) *A* has a right to discharge on *B*'s land the rain-water from the eaves of *A*'s house. This does not entitle *A* to advance his eaves if, by so doing, he imposes a greater burden on *B*'s land.

(c) *A*, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution ⁵.

(d) *A*, a riparian owner, acquires, as against the lower riparian

¹ The latter part of this section was suggested by the Prussian Landrecht, 1^{ter} Theil, 22^{ter} Titel, § 29.

² *Woodyer v. Hadden*, 5 Taunt. 132, per Chambre J.

³ *Gale*, 557: *Goddard*, 326.

⁴ 4 Suth. Civ. R. 49: *Panjāb Record*, 1867, p. 156: *Gale*, 577: *Landrecht*, ubi supra, § 70. So in the case of the dominant owner of a right of passage for boats in the rainy season over another person's tank, 7 Cal. 145. The English law agrees, *Pearson*

v. Spencer, 1 B. & S. 571: 3 B. & S. 761. That the way is impassable for want of repair makes no difference: see sec. 25.

No exception is made in the case of *aquæ ductus*. By Roman law the owner of such a servitude could not of his own motion alter the course of the pipes, when once it had been marked out (*Dig.* 8, 1, 9).

⁵ *Baxendale v. McMurray*, L. R., 2 Ch. Ap. 790: *Goddard*, 352.

owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle *A* to pollute the stream by discharging into it poisonous liquor¹.

Right to
do acts to
secure
enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement²; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible³; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage⁴.

Accessory
rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights⁵.

Illustrations.

(a) *A* has an easement to lay pipes in *B*'s land to convey water to *A*'s cistern. *A* may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state⁶.

(b) *A* has an easement of a drain through *B*'s land. The sewer with which the drain communicates is altered. *A* may enter upon *B*'s land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on *B*'s land⁷.

(c) *A*, as owner of a certain house, has a right of way over *B*'s land. The way is out of repair, or a tree is blown down and falls across it. *A* may enter on *B*'s land and repair the way or remove the tree from it.

(d) *A*, as owner of a certain field, has a right of way over *B*'s land. *B* renders the way impassable. *A* may deviate from the way and pass over the adjoining land of *B*, provided that the deviation is reasonable⁸.

¹ *A* as owner of three houses has an easement to drain them into *B*'s sewer. *B* builds three more cottages. He is not entitled to drain them also into the sewer, *Metropolitan Board of Works v. London & N.W. Ry. Co.*, 17 Ch. D. 246.

² Goddard, 21, 332.

³ Suggested by the Prussian Landrecht, 1^{ter} Theil, 22^{ter} Titel, § 33.

⁴ Gale, 555.

⁵ Gale, 550, calls them 'secondary easements.' See *infra*, sec. 33.

⁶ *Pomfret v. Ricroft*, 1 Wms. Saund. 322 b, 322 c, and see *Goodhart v. Hyett*, 25 Ch. D. 182, where the Court

restrained *B* from building a house over *A*'s pipe, on the ground that if the house were built it would be impossible, or at all events not reasonably practicable, for *A* to get at the pipe when he had need to repair it.

So if *A* has an easement to draw water from *B*'s well this includes the right to keep the well in repair (Dig. 43, 22, 1, 6). So an easement to water cattle on *B*'s land includes the right to lead them on to the land.

⁷ And of course *A* may enter and cleanse or repair the drain (Dig. 43, 23, 1, pr.).

⁸ Goddard, 374.

(e) *A*, as owner of a certain house, has a right of way over *B*'s field. *A* may remove rocks to make the way¹.

(f) *A* has an easement of support from *B*'s wall. The wall gives way. *A* may enter upon *B*'s land and repair the wall.

(g) *A* has an easement to have his land flooded by means of a dam in *B*'s stream. The dam is half swept away by an inundation. *A* may enter upon *B*'s land and repair the dam.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner². Expenses necessary for preservation of easement.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work³. Liability for damage from want of repair.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage⁴, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement⁵: but he must not do any act tending to restrict the easement or to render its exercise less convenient⁵. Servient owner not bound to do anything.

Illustrations.

(a) *A*, as owner of a house, has a right to lead water and send sewage through *B*'s land. *B* is not bound as servient owner to clear the watercourse or scour the sewer.

(b) *A* grants a right of way through his land to *B* as owner of a field. *A* may feed his cattle on grass growing on the way, provided that *B*'s right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent *B* from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) *A*, in respect of his house, is entitled to an easement of support from *B*'s wall. *B* is not bound as servient owner to keep

¹ Or if the way be a carriage-way, he may metal the road so as to render it fit for the traffic, *Newcomen v. Coulson*, 5 Ch. D. 133.

² Gale, 527.

³ Gale, 573. This rule is qualified by sec. 50 *infra*. The Act does not provide for the rights called in German *Reallasten*—such as the maintenance of embankments and sluices—which impose a duty upon a

given piece of land. As to embankments in Madras, see Act I of 1858, secs. 1 and 5: in Burma, Act XIII of 1877: in Bengal, Ben. Act II of 1882.

⁴ Thus where *B* has a right of passage for boats over *A*'s water-channel, *A* may raise an embankment narrowing the width of the channel, provided he leaves ample room for the passage of *B*'s boats, 7 Cal. 146, 147.

⁵ N. W. P. 1867, p. 191.

the wall standing and in repair¹. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support².

(d) *A*, in respect of his mill, is entitled to a watercourse through *B*'s land. *B* must not drive stakes so as to obstruct the watercourse³.

(e) *A*, in respect of his house, is entitled to a certain quantity of light passing over *B*'s land. *B* must not plant trees so as to obstruct the passage to *A*'s windows of that quantity of light⁴.

Extent of easements. **28.** With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:—

Easement of necessity. An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed⁴.

Other easements. The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired⁵.

In the absence of evidence as to such intention and purpose—

Right of way. (a) a right of way of any one kind does not include a right of way of any other kind⁶:

Right to light or air acquired by grant. (b) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made:

Prescriptive right to light or air. (c) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used⁷:

¹ Dig. 8, 5, 8, 2. There is no exception (as in Roman law) in the case of the servitude of support to a building.

² Gale, 570, 641.

³ Dig. 8, 2, 17, 1: Gale, 573.

⁴ *Corporation of London v. Riggs*, 13 Ch. Div. 798: Goddard, 357-360.

⁵ Gale, 341.

⁶ Gale, 350.

⁷ Gale, 324: Goddard, 335. Where the dominant owner opens a new window, the servient owner has a right to obstruct it if he can do so without obstructing the old window. But if he cannot obstruct the new without obstructing the old, he must submit to the burden, 7 Cal. 458, following *Tapling v. Jones*, 11 H. L. C. 290.

(d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose: and

Prescriptive right to pollute air and water.

(e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right¹.

Other prescriptive rights.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Increase of easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(a) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(c) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and in

Partition of dominant heritage.

¹ See 9 Cal. 778: 2 Suth. Civ. R. 212, 213: Goddard, 355.

the case of prescriptive rights, with the user during the prescriptive period¹.

Illustrations.

(a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path².

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day³.

(c) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed⁴.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user⁵.

¹ *Codling v. Johnson*, 9 B. & C. 934, per Bayley J.

² For an instance of a private way shared among several persons, see *Seiple v. London & Birmingham Ry. Co.*, 9 Sim. 209.

³ *Merlin, Répertoire*, tit. Servitude, p. 45.

⁴ *Gale*, 369.

⁵ *Goddard*, 329, 446. In 6 *Mad. H. C.* 112 the Court (in 1870) held that every trifling excess in the exercise of a *servitus stillicidii* did not justify the pulling down of the building creating the excess.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person. Right to enjoyment without disturbance.

Illustration.

A, as owner of a house, has a right of way over *B*'s land. *C* unlawfully enters on *B*'s land, and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction¹.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit² for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial³ damage to the plaintiff⁴. Suit for disturbance of easement.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the

¹ *A* as owner of a house has a right to use a drain under, and a passage through, *B*'s house. *B* lets his house to *C*, who stops the drain and passage. *A* may sue *C* for compensation, 6 *Suth. Civ. R.* 314. So where *A* has a right to discharge rain-water from his roof on *B*'s land and *B* sells the land, 3 *Agra* 191 (1867).

² against the person causing the disturbance, whether or no he be the servient owner, *Gale*, 658.

³ See *Walter v. Selfe*, 4 *De G. & S.* 315, per Knight-Bruce V.C.; *Goddard*, 438.

⁴ *Goddard*, 387, 392. There need not be a total obstruction, *Gale*, 634.

Explanation I.—An easement is impliedly released—

(a) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority¹;

(b) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(a) *A, B and C* are co-owners of a house to which an easement is annexed. *A*, without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(b) *A* grants *B* an easement over *A*'s land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

(c) *A*, having the right to discharge his eavesdroppings into *B*'s yard, expressly authorizes *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A*'s easement is extinguished to the extent of the interference.

(d) *A*, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) *A*, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on *B*'s land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on *C*'s land. The easement is impliedly released.

Extinction
by revoca-
tion.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement².

Extinction
on expira-
tion of term

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall

¹ Dig. 8, 6, 8, pr. : Gale, 29, 585.

² That a power reserved in a lease

of revoking an easement is valid, see Kent, Comm. iii. 453, note (e).

become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

or perform-
ance of dis-
solving
condition.

41. An easement of necessity is extinguished when the necessity comes to an end¹.

Extinction
on termin-
ation of
necessity.

Illustration.

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished².

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction
of useless
easement.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

Extinction
by per-
manent
change in
dominant
heritage.

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used³; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it⁴; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Extinction
on perma-
nent altera-
tion of
servient
heritage by
superior
force.

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of section 14 apply to such way.

¹ Goddard, 522.

² *Holmes v. Goring*, 2 Bing. 76.

³ *United Land Co. v. G. E. Ry.*, L. R., 10 Ch. Ap. 586.

⁴ See *Barnes v. Loach*, 4 Q. B. Div. 494, 498 (S. C. 48 L. J., Q. B. 756); *Harvey v. Walters*, L. R.; 8 C. P. 166.

Illustrations.

(a) *A* grants to *B*, as the owner of a certain house, a right to fish in a river running through *A*'s land. The river changes its course permanently and runs through *C*'s land. *B*'s easement is extinguished.

(b) Access to a path over which *A* has a right of way is permanently cut off by an earthquake. *A*'s right is extinguished¹.

Extinction
by destruction
of
either
heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. *A*'s easement is extinguished².

Extinction
by unity
of owner-
ship.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages³.

Illustrations.

(a) *A*, as the owner of a house, has a right of way over *B*'s field. *A* mortgages his house, and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(b) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section 41.

(c) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(e) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

¹ and he has no right to walk over the adjoining land, Goddard, 372. But where a stream of water from natural causes ceased for forty years to flow in its accustomed course and after some years returned, the right to the flow [and, presumably, an easement restricting that right] would not be extinguished, *Hall v. Swift*, 6 Scott, 167, and see *Hale v. Oldroyd*, 14 M. & W. 789.

² *A* as the owner of a house has a right to discharge rain-water by spouts

from its roof on to *B*'s land. The house is completely destroyed. The easement is extinguished; 1 Agra, 196, 197.

As to the revival of necessary and other easements extinguished under this section, see *infra*, sec. 51, para. 1.

³ 15 Ben. 365: *James v. Plant*, 4 A. & E. 761; Goddard, 494. As to the revival of easements extinguished under this section, see *infra*, sec. 51, para. 2.

(f) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished¹.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years. Extinction
by non-
enjoyment.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such².

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner³.

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(a) where the cessation is in pursuance of a contract between the dominant and servient owners;

¹ Goddard, 102, 103.

² So by the civil law the same period was fixed for the loss of a praedial servitude by non-user as for

its original acquisition by enjoyment, Gale, 630.

³ This is the Roman rule, Dig. 8, 2, 6.

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or

(c) where the easement is a necessary easement¹.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement².

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction
of accessory
rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration.

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

Suspension
of ease-
ment.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Servient
owner not
entitled to
require con-
tinuance.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

¹ i. e. an easement of necessity, *supra*, sec. 13.

² An easement is extinguished also when the servient heritage is taken under the Land Acquisition Act (X of 1870, secs. 16, 17), unless of course the dominant owner's right be saved expressly or by impli-

cation, 3 *Suth. Civ. R.* 27. For the English law as to extinction by cessation of enjoyment, see *Gale*, 586, 560. It turns on the doctrine of implied (or presumed) release or abandonment. So in America, *Kent, Comm. iii.* 448, 449.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Compensation for damage caused by extinguishment.

Illustration.

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed¹.

51. An easement extinguished under section 45 revives (a) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion²; (b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and (c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage³.

Revival of easements.

An easement extinguished under section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause⁴.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

¹ That a reciprocal easement cannot be acquired for the benefit of the servient tenement by the exercise of an easement by the dominant owner follows from *Mason v. The Shrewsbury & Ry. Co.*, L. R., 6 Q. B. 578, and *Arkwright v. Gell*, 5 M. & W. 203; *Goddard*, 20, 85-86, 504.

² Dig. 8, 6, 14, 2. Even after the prescriptive time has elapsed the servient owner could by Roman law be compelled to regrant the servitude. But the Indian Act imposes no such liability.

³ Dig. 8, 2, 20, 2: see 1 *Agra* (1866), p. 197.

⁴ *Gale*, 146, 582.

CHAPTER VI.

LICENSES.

'License'
defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful¹, and such right does not amount to an easement² or an interest in the property, the right is called a license.

Who may
grant
license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

Grant may
be express
or implied.

54. The grant of a license may be express or implied from the conduct of the grantor³, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

Accessory
licenses
annexed
by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A sells the trees growing on his land to *B*. *B* is entitled to go on the land and take away the trees⁴.

License
when trans-
ferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid⁵, a

¹ 4 Mad. H. C. 98: *Thomas v. Sorrel*, Vaughan, 351, who mentions a license to hunt in a man's park, a license to come into his house.

² As to the distinction between an easement and a license, see Kent, Comm. iii. 452.

³ Goddard on Easements, 3rd ed., p. 119.

⁴ even though *A* has in the mean-

time sold the land, Bro. Abr., *Trespass*, pl. 400: 7 Bac. Abr. 676, *Trespass*, F. 1, cited by Gale, 16, note.

⁵ i.e. unless a different intention is expressed or implied, as, for instance, where the license is to *B* 'and his assigns,' or the license is to search and get minerals and carry away the ore found, *Muskett v. Hill*, 5 Bing. N. C. 694.

license cannot be transferred by the licensee or exercised by his servants or agents ¹.

Illustrations.

(a) *A* grants *B* a right to walk over *A*'s field whenever he pleases. The right is not annexed to any immoveable property of *B*. The right cannot be transferred ².

(b) The Government grant *B* a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, *B*'s servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware. Grantor's duty to disclose defects.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee. Grantor's duty not to render property unsafe.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license ³. Grantor's transferee not bound by license.

60. A license may be revoked by the grantor ⁴, unless— License when revocable.

(a) it is coupled with a transfer of property and such transfer is in force ⁵:

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution ⁶.

61. The revocation of a license may be express or implied. Revocation express or implied.

Illustrations.

(a) *A*, the owner of a field, grants a license to *B* to use a path

¹ It is founded on personal confidence, Kent, Comm. iii. 453.

² *Ackroyd v. Smith*, 10 C. B. 164.

³ *Roffey v. Henderson*, 17 Q. B. 574; *Coleman v. Foster*, 1 H. & N. 37; *Wallis v. Harrison*, 4 M. & W. 538. Sec. 59 does not refer to accessory licenses, as to which see sec. 55.

⁴ 4 Mad. H. C. 98, and see *R. v. Inhab. of Mellor*, 2 East, 189; *Williams v. Morris*, 8 M. & W. 488,

493; *Perry v. Fitzhew*, 8 Q. B. 757; *Taplin v. Florence*, 10 C. B. 744; *Adams v. Andrews*, 15 Q. B. 284.

⁵ Gale, 69; *Goddard*, 505; *Wood v. Leadbitter*, 13 M. & W. 844.

⁶ *Winter v. Brockwell*, 8 East, 308, where the licensee had made a skylight over the licensor's area; Kent, Comm. iii. 452. There is no exception where the license is under seal.

across it. *A*, with intent to revoke the license, locks a gate across the path. The license is revoked¹.

(*b*) *A*, the owner of a field, grants a license to *B* to stack hay on the field. *A* lets or sells the field to *C*. The license is revoked².

License
when
deemed
revoked.

62. A license is deemed to be revoked³—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license :

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative :

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled :

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right :

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license :

(*f*) where the license is granted for a specified purpose and the purpose is attained⁴, or abandoned, or becomes impracticable :

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist :

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee :

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Licensee's
rights on
revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to

¹ *Hyde v. Graham*, 1 H. & C. 593.

² 1 H. & N. 37; 4 M. & W. 538; Gale, 65; Goddard, 396, 508. As to secs. 60, 61, see 8 All. 69, 70.

³ Kent, Comm. iii. 452.

⁴ Where *A* grants *B* a license to

erect a dam across *A*'s stream, the license is held in America to terminate with the decay of the dam, 'as the purpose of the license has then been fulfilled,' Kent, iii. 452.

remove any goods which he has been allowed to place on such property¹.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor².

¹ *Cornish v. Stubbs*, L. R., 5 C. P. 334: *Mellor v. Watkins*, L. R., 9 Q. B. 400.

² The Act is silent as to the licensee's rights against third persons. See *Hill v. Tupper*, 2 H. & C. 121:

Whaley v. Laing, 2 H. & N. 476. Mr. Goddard thinks that as a general rule a licensee has no right of action against a stranger who obstructs his privilege.

INTRODUCTION TO THE SPECIFIC RELIEF ACT.

THE remedies for the non-performance of a duty enforceable by law are either compensatory or specific.

The compensatory remedy is the award of what is commonly called damages. This remedy is often either useless or inadequate: useless, where the person ordered to pay them is insolvent; and inadequate, where (for instance) the duty is to transfer a particular house or piece of land, or a moveable to which special interest is attached.

The specific remedy is enforced by directing the party in default to do or forbear the very thing which he is bound to do or forbear, and then, in case he disobeys, by putting him into prison, or attaching his property, or both¹. Where no one is in default, it is enforced by making such declarations and orders as the nature of the case may require.

The specific remedies commonly enforced by Indian (as by English) Courts are—

(a) taking possession of certain property and delivering it to the claimant :

(b) ordering a party to do the very act which he is under an obligation to do :

(c) preventing him from doing that which he is under an obligation not to do :

(d) rectifying instruments :*

(e) rescinding contracts in writing :

(f) cancelling instruments :

(g) determining and declaring the rights of parties to status or property, otherwise than by the award of compensation :

(h) appointing a Receiver :

(i) taking an account of the property of a deceased person and administering the same :

(j) taking accounts of a trust and administering the trust property :

¹ Code of Civil Procedure, sec. 260.

(*k*) the foreclosure of the right to redeem, or the sale of, mortgaged property :

(*l*) the redemption and reconveyance of mortgaged property :

(*m*) dissolving a partnership, taking the partnership accounts, realizing the assets, compelling each partner to pay the balance due from him, and discharging the debts of the partnership.

The compensatory remedy has been to some extent dealt with by the Contract Act, sec. 73. The present Act deals with it only so far as it is either supplementary or alternative to specific relief. The specific remedies respectively marked *i*, *j*, *k*, *l*, and *m* are dealt with by the Code of Civil Procedure¹, the Trusts Act², and the Transfer of Property Act³. The remaining specific remedies are dealt with by the Specific Relief Act. This Act is divided into three Parts, the first containing, besides the usual preliminary matter, a declaration that specific relief cannot be granted for the mere purpose of enforcing a penal law, the second containing provisions as to the kinds of relief above specified in paragraphs *a*, *b*, *d*, *e*, *f*, *g*, and *h*; and the third relating to the preventive relief referred to in clause *c*.

The second Part treats, first, of the recovery of possession of property, whether moveable or immoveable. When a person is wrongfully dispossessed of immoveable property, sec. 9 (founded on Act XV of 1859, sec. 15) gives him a remedy resembling the Roman interdict *de vi* and the English assize of novel disseisin⁴. The object is to discourage people from taking the law into their own hands⁵. A clause equivalent to Act XXIII of 1861, sec. 26, bars appeals against decrees in suits under section 9.

Section 10 deals with the recovery of specific moveable property, and confers a remedy similar to that obtainable in an English action of detinue. Explanations show that a special or temporary right (such as that of a warehouse-keeper) to the present possession of property suffices for the relief intended, and that a bare fiduciary ownership will entitle a trustee to sue. The defendant has not the option of retaining the property on paying its value⁶.

Section 11 deals with the jurisdiction to compel specific delivery of particular moveables, administered by Courts of Equity, and provides for a class of cases analogous to that in which specific relief is given by section 9 in respect to immoveable property. An English statutory provision on the subject is contained in the Mercantile Law Amendment Act, 19 & 20 Vic. c. 97, sec. 2.

¹ Sec. 213, and Sched. IV, Nos. 105-110, 113.

² Act II of 1882, sec. 59.

³ Secs. 60, 67, 85-95.

⁴ 5 Bom. 208, 217.

⁵ 8 Bom. 375, per Sargent C.J.

⁶ See C. L. Proc. Act, 1854, sec. 78.

Specific
perform-
ance of
contracts.

Chapter II, ~~the most important part of the Act, contains the rules~~ relating to the specific performance of agreements enforceable by law. It treats, first, of contracts which may be specifically enforced. These are, any agreement enforceable by law when (1) the act agreed to be done is in the performance of a trust, or (2) no standard exists for ascertaining the actual damage caused by the non-performance of the act agreed to be done, or (3) the act is such that pecuniary compensation for its non-performance would not afford adequate relief, or (4) it is probable that such compensation cannot be obtained. Sections 14, 15, 16, 17 provide for the specific performance of contracts so far as they can be performed, and for compensation so far as it is not possible to perform them. This jurisdiction is a delicate one, as, when the person seeking performance was the person in default, it amounts to something like making a new contract between the parties. Yet it often happens that there is some quite insignificant part of the contract which the party seeking performance was bound to perform but could not. In such a case it is wrong that because some little thing remains undone the whole contract should fail¹. Section 14 deals with the case where the part which must be left unperformed is small in proportion to the whole in value, and admits of compensation in money. Section 15 exhibits the different positions held by the party in default and his opponent, when the default is of greater magnitude. The Act then treats of contracts not specifically enforceable, such as contracts for the non-performance of which damages are an adequate remedy, contracts dependent on personal qualifications, contracts immediately revocable by the defendant. It deals, thirdly, with the discretion of the Court—the *arbitrium boni iudicis*—as to decreeing specific performance. It treats, fourthly, of the persons for whom contracts may be specifically enforced; fifthly, of the personal bars to the relief; sixthly, of the cases in which contracts cannot be specifically enforced except with a variation; seventhly, of the persons against whom contracts may be specifically enforced; and, eighthly, of the persons who cannot be compelled to perform. The chapter concludes with two sections, one (sec. 29) as to the effect of dismissing a suit for specific performance, the other (sec. 30) applying the preceding sections to awards and to testamentary directions to execute settlements.

The Roman law, the modern systems founded thereon, and the Common Law of England, generally hold to the maxim *Nemo potest praecise cogi ad factum*, and in case of breach of contract only give

¹ See per Lord Eldon, *Mortlock v. Buller*, 10 Ves. 305-6.

the injured party the right to damages for non-performance¹. In framing Chapter II, therefore, the rules of the English Courts of Equity were necessarily followed, and almost all the illustrations were taken from the Equity reports. But owing to the non-existence in India of separate courts of law and equity, the absence of the Statute of Frauds and other circumstances, it was found possible to simplify these rules greatly. The principal differences between the English and the Indian systems are—

1. The Act discards the English doctrine that a contract to be specifically enforced must be such that it might, when it was entered into, have been enforced by either of the parties against the other². This principle found its place in Courts of Equity rather from a desire for symmetry than from its inherent utility.

2. The Act (sec. 29) declares that the dismissal of a suit for specific performance of a contract shall bar the plaintiff's right to sue for compensation for its breach. This is not so in England. But as in India all remedies on an agreement can be granted by one and the same Court, it is clear that only one suit should lie on account of its non-performance.

3. In England it has more than once been ruled that the Court of Chancery will not compel the performance of a continuous duty extending over many years. The Act renders this doctrine more precise by declaring (sec. 21, cl. g) that contract, the enforcement of which necessarily involves the performance of continuous duties over a longer period than three years from its date, shall not be specifically enforced.

4. The rules as to when a contract for the sale of a married woman's estate will be specifically enforced are in England excessively complicated³. The Act makes no distinction in her case, and thus recognises the principle embodied in the Indian Succession Act, sec. 4, and Act III of 1874.

5. In England a voluntary settlement of personal chattels is binding on the settlor, and cannot be defeated by a subsequent sale. But it is otherwise in the case of freeholds, copyholds,

¹ See Pothier, *Oblig.* part I. c. II. art. 2. § 2: Fry on Specific Performance, 2nd ed., 3. But it seems possible to make a decree for specific performance under the German *Reichs-civilprozessordnung*, §§ 769, 771, 773, 774, 775. And in Holland, and in British colonies in which Dutch law is administered, it is believed that such decrees are not infrequent. See

Vanderlinden's *Institutes of the Law of Holland*, translated by Henry, London, 1828, p. 198. At p. 9 of his book Lord Justice Fry suggests that the origin of the jurisdiction may be found in the Canon Law, and quotes the Decretals of Gregory, IX. lib. 1, tit. 35, c. 2.

² See Fry, p. 201.

³ See Fry, pp. 113-117.

and leaseholds; and specific performance of a subsequent agreement to sell land may be enforced against the voluntary settlor, and the parties claiming under the settlement, though not by the settlor. The Act does not recognise this distinction (which is due to an artificial construction of 27 Eliz., chap. 4), and treats land in this respect as if it were moveable property. The provisions on this subject are contained in section 24, cl. d, which provides that specific performance of a contract cannot be enforced in favour of a person who previously to the contract had notice that a voluntary settlement of its subject-matter had been made and was then in force, and in section 25, cl. c, which provides that specific performance of a contract for sale or letting cannot be enforced in favour of a vendor or lessor who, previous to entering into the contract, has made a similar settlement.

6. The absence in India (outside the Presidency Towns) in 1877 of any enactments resembling the Statute of Frauds, secs. 1, 3, 4, 17, rendered it unnecessary to embody in the Act the intricate rules of the Court of Chancery as to when a parole agreement relating to land will, and when it will not, be specifically enforced. Since 1877 the Transfer of Property Act has been passed; but the distinction between secs. 54, 59, 107, and 118 of that Act and the Statute of Frauds, sec. 4, is that an agreement which does not fulfil the requirements of the Act is void, whereas an agreement which does not fulfil the requirements of the Statute is merely unenforceable.

7. It seems impossible to elicit a consistent doctrine from the English decisions as to the rights of a purchaser or lessee to specific performance with abatement or compensation when the title of the person agreeing to sell or lease is defective. The Act lays down that only in one case can such relief be granted, namely, where the part of the agreement which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money. This relieves the Courts from the exercise of a duty which in many cases must be more a matter of guess-work than of judicial discretion.

8. The right to enforce a contract specifically may in England be lost by delay in resorting to the Court, and a large mass of cases exists relating to this doctrine. The Specific Relief Act contains no rules on this subject, for it had been held that in India the provision of the Limitation Act, art. 113, that suits for specific performance must be brought within three years from the date fixed for the performance, or if no such date is fixed when the plaintiff has notice that the performance is refused, rendered the

doctrine of laches inapplicable to this kind of litigation¹. The correctness of this view is doubtful, and until the matter is made clear by the Legislature, it will be safer to hold that when the plaintiff's laches is such as to amount under the circumstances to an abandonment on his part of the contract, and the defendant has not waived the delay, specific performance should be refused.

9. As the jurisdiction is against the person of the defendant on the equity arising from the contract², the Courts in England can entertain a suit for specific performance of a contract relating to land where the subject-matter of the contract is not within the local limits of the jurisdiction. But in India the Presidency High Courts are precluded by their Letters Patent, cl. 12, from entertaining such suits³, and the Mufassal Courts have been thought⁴ incapable of enforcing such contracts.

Chapter III deals with the subject of the rectification of instruments, when through fraud or a mutual mistake of the parties to any instrument in writing, it does not truly express their intention as to its meaning and legal effect at the time of its execution. It is taken from the draft New York Civil Code, and concludes with declaring that a contract in writing may be first rectified so as to bring it into conformity with the intention of the parties, and then if the plaintiff has so prayed in his plaint, and the Court thinks fit, specifically enforced. Rectification of instruments.

Chapter IV deals with a proceeding exactly the opposite of the specific performance of contracts. It declares that any person interested in a contract in writing may have it rescinded in the following three cases :— Rescission of contracts.

(a) where the contract is voidable or terminable by the plaintiff;

¹ 2 Mad. H. C. 114, per Scotland C.J., 270, per Holloway J. Mr. Lewin, *Trusts*, 873, thinks that 'the legislature itself having prescribed a term of limitation which it deems sufficiently short, the Court ought not further to abridge that term.' In 10 Cal. 1061, however, the Court thought that there might be circumstances under which a delay of three years or even less may be fatal to the suit. But the Madras decisions were not cited, nor was Mr. Lewin's opinion. As to the English doctrine, see *Fry*, 474 et seq.

² *Fry*, 45.

³ 5 Cal. 82, per Pontifex J.

⁴ Collett, 69, citing *Hart v. Herwig*,

L. R., 8 Ch. 864. But the proviso in the Code of Civil Procedure, sec. 16 (which does not apply to the High Courts), seems to contemplate such suits; at least when the land is situate within British India: 'Provided that suits to obtain relief respecting... immovable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained by his personal obedience, be instituted in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.'

(b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff;

(c) where the contract is for sale or to take a lease, and a decree for its specific performance has been made, and the purchaser or lessee fails to pay the purchase-money or other sums which the Court has ordered him to pay.

Cancellation of instruments.

Chapter V declares that any person against whom a written instrument is void or voidable, who has reasonable apprehension that if left outstanding it may cause him serious injury, may obtain an adjudication that it is void or voidable and an order that it be delivered up and cancelled. The relief extends to a forged instrument, and also to one originally valid but which has subsequently become forged. The Chapter applies to cases not unfrequent in India, where a party gets possession of a document, on which he might not indeed be able to found a claim in a Court of Justice, but which might give him such *prima facie* right against the other as would expose him to vexatious demands and litigation.

When an instrument is evidence of different rights or different obligations, the Court may cancel it in part and allow it to stand for the residue (sec. 40). Thus a forged endorsement on a bill may be cancelled, and the bill be left to stand in other respects. When cancelling an instrument the Court may require the party for whom this is done to make such compensation to the other as justice may require. If a cancelled instrument has been registered, the Court cancelling it may cause the fact of the cancellation to be noted in the Registry Office.

Declaratory decrees.

Chapter VI took the place of Act VII of 1859, sec. 15, and differs from the English and the former Indian law on the subject in barring the Courts from making declaratory decrees *only* in cases where the plaintiff, being able to seek further relief than a mere declaration of right, omits to do so. It authorises the Court to make declaration of future rights, provided only such rights are vested. It allows the Court to make a declaratory decree where there is no right to any consequential relief, and thus fills a gap in Indian law which gave us power to file a suit to perpetuate testimony. This important and useful change, the Indian reflex of the Scotch action of declarator, was suggested by Mr. Pitt Kennedy, who was Standing Counsel to Government when the Bill (now Act I of 1877) was before the Council. Mr. Kennedy said:—

‘It is generally of grave importance for every man to know

precisely his pecuniary position, and serious difficulties might often be avoided if this could be accomplished. I confess myself unable to discover why, when others advance a claim to property which one believes to be his, whether in possession or not, he should not have the power of settling the point at the earliest period instead of being obliged to wait till his evidence may be lost, and to keep his arrangements for his family uncertain. The old rule was based, so far as I can discover, on the (possibly not unnatural) dislike of Judges to be troubled with the decision of a point of difficulty if they could in any way avoid it. One singular illustration of the length to which this was carried is to be found in *Bull v. Pritchard*, in which the same will was construed as respects the personalty by Lord Giffard in 1826 (1 Russ. 213), and as regards freeholds by Sir J. Wigram twenty years afterwards (5 Hare 567), with a precisely similar result.'

Mr. Kennedy then referred to one of the illustrations in the Bill, which supposed *A* to be in possession of land and *B* to be threatening him with litigation, and which proceeded on the theory that *A* would have no right to declaratory relief. And he continued thus:—

'Illustration (e) does clearly illustrate the section, but why should *A* not have the power to quiet his title? The claim is a serious invasion of his rights, and would no doubt lower the selling value of his property; why should he not have the power of putting *B* to the alternative of renouncing or proving his claim, at the cost of *B*, if *B* had advanced it rashly or maliciously? Doubtless, this section does follow the decisions on the English Act and the Procedure Code, but this Bill is to amend as well as to define; and so far as I can discover, such powers would be no novelties in law; the Scotch action of declarator is, I believe, precisely pointed at such cases. In my own experience, I have known of great difficulties being imposed on a family by the existence of a supposed defect of title in a portion of the family property, which much complicated the testamentary arrangements of the father, and which could easily have been set at rest if effective powers analogous to the Scotch declarator had existed, though the doubt was quite insoluble for the time under English procedure.'

Mr. Hobhouse, when presenting the report of the Select Committee, said that he could not answer Mr. Pitt Kennedy's argument, and he could add something to it from his own experience. When he was practising at the Chancery Bar, it not unfrequently happened that people desired to have some question settled for

the purpose of family arrangements, and that there was extreme difficulty, sometimes insuperable, sometimes superable only by the exercise of great professional craft, in finding out how to get up an actual conflict of present rights, so as to compel the Court to decide the question at issue.

The Committee had therefore made an alteration in the Bill, bringing it more in accord with Scotch law than with English. In order to avoid multiplicity of actions and to prevent a man getting a declaration of right in one suit and immediately afterwards a remedy in another, they had provided that if he was able to seek more substantial relief beyond a declaration, he should do so; but that the mere circumstance of his right being a present right should not prevent him from obtaining relief by way of declaration.

As Mr. Collett remarks in his commentary on the Specific Relief Act, to found a suit for a declaratory decree three things seem essential:—

1. There must be a present existing interest, however distant the actual enjoyment may be:
2. There must be some present danger or detriment to be averted by the declaration¹:
3. He who seeks only a declaratory decree must not be at the time entitled to an executory decree.

Appoint-
ment of
receivers.

Chapter VII merely declares that the appointment of a receiver of the subject-matter of litigation pending a suit rests in the discretion of the Court and refers to the Code of Civil Procedure for the mode and effect of his appointment and for his rights, powers, duties and liabilities. See the Code, secs. 503-505. The jurisdiction to appoint a receiver, especially in partnership cases, often raises questions of great difficulty², and it would be desirable to add to this chapter some illustrations for the guidance of the Mufassal Courts.

Enforce-
ment of
public
duties.

Chapter VIII enumerates the cases in which the High Courts at Calcutta, Madras and Bombay may make an order equivalent to the old prerogative writ of mandamus³, the issue of which hereafter is expressly forbidden by section 50. The operation of the powers conferred by this chapter is confined to the local limits of

¹ See 2 Story's Equity Jurisprudence, 1511.

² Kerr on Receivers, 2nd ed., pp. 63-78.

³ The right to issue this writ was enjoyed by the Presidency High

Courts as part of their *ordinary* original civil jurisdiction. Hence Chapter VIII does not apply to the High Court at Allahabad or to the Chief Court of the Panjáb, which do not possess that kind of jurisdiction.

the ordinary original civil jurisdiction of the Court exercising it. The power might usefully be extended to Mufassal municipalities; but the necessary legislation would probably be opposed by the local governments concerned. The Court may require any specific act to be done or forborne by any person holding a public office or by any corporation or inferior Court of Judicature, provided that the following conditions are fulfilled:—

(a) An application for the order must be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing of the act.

(b) The doing or forbearing is under any law for the time being enforced clearly incumbent on the person, court or corporation in his or its public or corporate character.

(c) Such doing or forbearing is in the opinion of the High Court consonant to right and justice.

(d) The applicant has no other specific and adequate legal remedy.

(e) The remedy given by the order applied for will be complete.

The Secretary of State for India in Council, the Governor-General in Council, and the three local Governments concerned are exempt from this power.

Preventive relief is granted at discretion of the Court by injunction temporary or perpetual. Preventive relief.

Temporary, or as they are sometimes called interlocutory, injunctions are simply intended to preserve the *status quo* pending the decision of the suit. They may be granted at any period of a suit, are treated as of the nature of procedure, and are therefore regulated by the Code of Civil Procedure, secs. 492, 493.

Perpetual injunctions are only granted by the decree made at the hearing and upon the merits of the suit.

A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant. When such obligation arises from contract, the Court is guided by the rules and provisions contained in Chapter II relating to specific performance. Perpetual injunctions.

Where the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property¹, the Court may grant a perpetual injunction in the following five cases:—

(a) Where the defendant is trustee of the property for the plaintiff.

¹ This is explained to include a trade-mark, a matter on which *Singer Manufacturing Co. v. Wilson*, 2 Ch. Div. 449, had thrown some doubt.

(b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion.

(c) Where the invasion is such that pecuniary compensation would not afford adequate relief.

(d) Where it is probable that pecuniary compensation cannot be got for the invasion.

(e) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Mandatory
injunctions.

When to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court is empowered to grant an injunction to prevent the breach and also to compel performance of the requisite acts. The circuitous method of compelling a man (for example) to pull down a wall by enjoining him not to keep it up is wisely discarded by the Act.

Section 56 enumerates the defences to a suit for an injunction. It does not forbid the Courts to grant injunctions to prevent libels. Notwithstanding Lord Cairns' decision in *Prudential Assurance Co. v. Knott*¹, the Select Committee did not see why breach of the obligation not to injure a man's reputation should not be restrained like the breach of any other obligation, and the provision in section 7 prevents any clashing with the criminal law.

Section 57 enables the Court under certain circumstances to grant an injunction to perform an agreement not to do a certain act.

The Specific Relief Act occupies a middle ground between Substantive law and Procedure, between the Contract Act on the one hand and the Civil Procedure Code on the other. It is therefore placed at the end of the first volume of this work.

History of
the Act.

The framing of this Act was suggested to the writer in 1875 by the draft New York Civil Code, 1862, which contains a Title called 'Specific and Preventive Relief,' consisting of three chapters headed respectively 'General Principles,' 'Specific Relief,' and 'Preventive Relief.' On this plan he proceeded to draw a bill, using as his model for secs. 5, 6, 7, 8, 10, 11 the New York draft, and for sec. 9 the Indian Act XIV of 1859, sec. 15. For the most important part of the draft—that relating to the specific performance of contracts—some help was got from the New York draft, but far more from the English equity reports and the works of Mr. Dart and Lord Justice Fry. Two of its sections

¹ 44 L. J., Ch. 192.

(14, 15) had been drafted in England by the Law Commissioners. The chapters on Rectification, Rescission, and Cancellation are for the most part taken from the New York draft. The chapter on Declaratory Decrees, originally framed on sec. 15 of the Civil Procedure Code of 1859 (itself copied from the English enactment 15 & 16 Vic. c. 86, sec. 50), is in its present form suggested by the Scotch action of declarator. The section on Receivers was suggested by Mr. Pitt Kennedy. The chapter on the Enforcement of Public Duties was distilled from Tapping's and other English books on mandamus, and the draft of this part of the Act was submitted by the law-member to Sir R. Couch, then Chief Justice of Bengal, who returned it to him unaltered. Lastly, in drawing the chapters on Injunctions some help was got from the New York chapter on Preventive Relief and Mr. Kerr's work on the subject. The Bill was carefully revised and much improved by Mr. (now Lord) Hobhouse, then law-member of the Governor-General's Council. He in particular drew the section (22) on Discretion, and most, if not all, the illustrations which had not been taken from the equity reports. With the permission of the Secretary of State, the Bill was introduced in December 1875: it was referred to a Select Committee, who revised it with the aid derived from some valuable criticisms by Mr. Pitt Kennedy; and it was passed in February 1877, and came into force on the 1st of May in that year.

Since then, though it has been in force throughout the whole of British India, except what are called the Scheduled Districts¹, and applied to every class of the population, it has worked smoothly, and no amendments have been found necessary. But whenever it is revised by the Legislature it would perhaps be well to make its classification of trusts harmonize more completely with that of Act II. of 1882; to repeal sections 5 and 6 as unnecessary; and to make it clear that the Court may impose terms when (under section 10) it compels the delivery of title-deeds. In the chapter on Specific Performance it should be expressly stated that laches is no defence: that a decree for specific performance cannot be coupled with an award of indemnity, that such decrees may be made where the subject-matter of the contract is land out of British India, if the defendant is within the jurisdiction of the country, and that the English doctrine of mutuality of remedy does not apply. To section 18, cl. (c) should be added some words such as 'of such interest as he has as such:' and in section 21 some

Suggestions for its amendment.

¹ As to Upper Burma, see the note infra, on sec. 1.

rule should be laid down to show the limits of the Court's power to superintend the execution of works such as building, road-making, or repairing. The basis of a suit for a declaratory decree should be more clearly described. To the chapter on the appointment of receivers some illustrations might be added to show when the Court may fitly refuse to appoint. Lastly, the power to make orders in the nature of a mandamus (Chap. viii) might properly be given to the High Court at Allahabad, the Chief Court of the Panjáb, and, perhaps, the Recorder of Rangoon; and the local limits of this useful jurisdiction might be extended so as to enable the Courts possessing it to control Mufassal municipalities.

THE SPECIFIC RELIEF ACT, 1877.

CONTENTS.

Preamble.

PART I.

PRELIMINARY.

	SECTION
Short title	1
Local extent	<i>ib.</i>
Commencement	<i>ib.</i>
Repeal of enactments	2
Interpretation-clause	3
Savings	4
Specific relief how given	5
Preventive relief	6
Relief not granted to enforce penal law	7

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(a) POSSESSION OF IMMOVEABLE PROPERTY.

Recovery of specific immoveable property	8
Suit by person dispossessed of immoveable property	9

(b) POSSESSION OF MOVEABLE PROPERTY.

Recovery of specific moveable property	10
Liability of person in possession, not as owner, to deliver to person entitled to immediate possession	11

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

(a) CONTRACTS WHICH MAY BE SPECIFICALLY ENFORCED.

Cases in which specific performance enforceable	12
Contracts of which the subject has partially ceased to exist	13

	SECTION
Specific performance of part of contract where part unperformed is small	14
Specific performance of part of contract where part unperformed is large	15
Specific performance of independent part of contract	16
Bar in other cases of specific performance of part of contract	17
Purchaser's rights against vendor with imperfect title	18
Power to award compensation in certain cases	19
Liquidation of damages not a bar to specific performance	20
(b) CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED.	
Contracts not specifically enforceable	21
(c) OF THE DISCRETION OF THE COURT.	
Discretion as to decreeing specific performance	22
(d) FOR WHOM CONTRACTS MAY BE SPECIFICALLY ENFORCED.	
Who may obtain specific performance	23
(e) FOR WHOM CONTRACTS CANNOT BE SPECIFICALLY ENFORCED.	
Personal bars to the relief	24
Contracts to sell property by one who has no title, or who is a voluntary settlor	25
(f) FOR WHOM CONTRACTS CANNOT BE SPECIFICALLY ENFORCED, EXCEPT WITH A VARIATION.	
Non-enforcement except with variation	26
(g) AGAINST WHOM CONTRACTS MAY BE SPECIFICALLY ENFORCED.	
Relief against parties and persons claiming under them by subsequent title	27
(h) AGAINST WHOM CONTRACTS CANNOT BE SPECIFICALLY ENFORCED.	
What parties cannot be compelled to perform	28
(i) THE EFFECT OF DISMISSING A SUIT FOR SPECIFIC PERFORMANCE.	
Bar of suit for breach after dismissal	29
(j) AWARDS AND DIRECTIONS TO EXECUTE SETTLEMENTS.	
Application of preceding sections to awards and testamentary directions to execute settlements	30

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

When instrument may be rectified	31
Presumption as to intent of parties	32
Principles of rectification	33
Specific enforcement of rectified contract	34

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

	SECTION
When rescission may be adjudged	35
Rescission for mistake	36
Alternative prayer for rescission in suit for specific performance	37
Court may require party rescinding to do equity	38

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

When cancellation may be ordered	39
What instruments may be partially cancelled	40
Power to require party for whom instrument is cancelled to make compensation	41

CHAPTER VI.

OF DECLARATORY DECREES.

Discretion of Court as to declarations of status or right	42
Bar to such declaration	ib.
Effect of declaration	43

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appointment of Receivers discretionary	44
Reference to Code of Civil Procedure	ib.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

Power to order public servants and others to do certain specific acts	45
Exemptions from such power	ib.
Application how made	46
Procedure thereon	ib.
Order in alternative	ib.
Peremptory order	47
Execution of, and appeal from, orders	48
Costs	49
Bar to issue of <i>mandamus</i>	50
Power to frame rules	51

PART III.

OF PREVENTIVE RELIEF.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

	SECTION
Preventive relief how granted	52
Temporary injunctions	53
Perpetual injunctions	56.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

Perpetual injunctions when granted	54
Mandatory injunctions	55
Injunction when refused	56
Injunction to perform negative agreement	57

SCHEDULE.—Enactments repealed.

ACT No. I OF 1877.

PASSED BY THE GOVERNOR GENERAL OF
INDIA IN COUNCIL.

(Received the assent of the Governor General on the 7th February, 1877.)

*An Act to define and amend the law relating to
certain kinds of Specific Relief.*

WHEREAS it is expedient to define and amend the law Preamble.
relating to certain kinds¹ of specific relief obtainable in civil
suits; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

1. This Act may be called 'The Specific Relief Act, 1877:' Short title.
It extends to the whole of British India, except the Sche- Local
duled Districts as defined in Act No. XIV of 1874²; extent.

And it shall come into force on the first day of May 1877. Commence-
ment.

2. On and from that day the Acts specified in the Schedule Repeal of
hereto annexed shall be repealed to the extent mentioned in enact-
ments,
its third column.

¹ The Act is not exhaustive. See
for instance the Code of Civil Pro-
cedure, sched. iv. Nos. 105-110, 113.

² And under Act XX of 1886, sec. 8,
and the second Schedule, the Specific

Relief Act, sec. 9 (but no other part
of the Act) is in force in Upper Burma
generally, except the Shan States.
The whole Act seems in force in the
town of Mandalay.

Interpre-
tation-
clause.
'obligation.'
'trust.'
'trustee.'

3. In this Act, unless there be something repugnant in the subject or context,—

'obligation' includes every duty enforceable by law¹:

'trust' includes every species of express, implied, or constructive fiduciary ownership:

'trustee' includes every person holding, expressly, by implication, or constructively, a fiduciary character²:

Illustrations.

(a) *Z* bequeaths land to *A*, 'not doubting that he will pay there-out an annuity of Rs. 1000 to *B* for his life.' *A* accepts the bequest. *A* is a trustee, within the meaning of this Act, for *B*, to the extent of the annuity³.

(b) *A* is the legal, medical, or spiritual adviser of *B*. By availing himself of his situation as such adviser, *A* gains some pecuniary advantage which might otherwise have accrued to *B*. *A* is a trustee, for *B*, within the meaning of this Act, of such advantage⁴.

(c) *A*, being *B*'s banker, discloses for his own purpose the state of *B*'s account. *A* is a trustee, within the meaning of this Act, for *B*, of the benefit gained by him by means of such disclosure.

(d) *A*, the mortgagee of certain leaseholds, renews the lease in his own name. *A* is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease⁵.

(e) *A*, one of several partners, is employed to purchase goods for the firm. *A*, unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. *A* is a trustee, for his co-partners, within the meaning of this Act, of the profit so made⁶.

(f) *A*, the manager of *B*'s indigo-factory, becomes agent for *C*, a vendor of indigo-seed, and receives, without *B*'s assent, commission on the seed purchased from *C* for the factory. *A* is a trustee, within the meaning of this Act, for *B*, of the commission so received⁷.

(g) *A* buys certain land with notice⁸ that *B* has already con-

¹ whether the duty arise out of tort or out of contract.

² A director of a company, for instance, 9 Bom. 394.

³ *Parsons v. Baker*, 18 Ves. 476.

⁴ Here *A* has gained the advantage by 'undue influence.' The burden of establishing the fairness of the transaction is on *A*, at least when he is *B*'s legal adviser, L. R. 1 Ind. App. 206. The same principle appears in case of parent and child, guardian and ward, trustee and beneficiary, and indeed wherever confidence exists be-

tween the parties.

⁵ *Rushworth's Case*, Freem. 12.

⁶ *Bentley v. Craven*, 18 Beav. 75.

⁷ See *Massey's Case*, 2 Ves. 317.

Illustration (e) was suggested by Mr. Pitt Kennedy, who said that in the course of his practice he had found that in a considerable district in Bengal, not only the managers of indigo factories, but the judicial officers, seemed to consider the gain perfectly legitimate for the managers.

⁸ This Act contains no definition of 'notice,' nor is there one in the

tracted to buy it. *A* is a trustee, within the meaning of this Act, for *B*, of the land so bought.

(*h*) *A* buys land from *B*, having notice¹ that *C* is in occupation of the land. *A* omits to make any inquiry as to the nature of *C*'s interest therein. *A* is a trustee, within the meaning of this Act, for *C*, to the extent of that interest².

'settlement' means any instrument (other than a will or 'settlement' codicil³ as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of:

and all words occurring in this Act, which are defined in the Indian Contract Act, 1872⁴, shall be deemed to have the meanings respectively assigned to them by that Act. Words defined in Contract Act.

4. Except where it is herein otherwise expressly enacted, Savings. nothing in this Act shall be deemed—

(*a*) to give any right to relief in respect of any agreement which is not a contract⁵;

(*b*) to deprive any person of any right to relief⁶, other than specific performance, which he may have under any contract; or

(*c*) to affect the operation of the Indian Registration Act on documents.

5. Specific relief is given—

(*a*) by taking possession of certain property and delivering it to a claimant⁷; Specific relief how given.

(*b*) by ordering a party to do the very act which he is under an obligation to do⁸;

(*c*) by preventing a party from doing that which he is under an obligation not to do⁹;

General Clauses Act. The Courts would probably adopt that contained in the Transfer of Property Act (supra, p. 747) and the Trusts Act (supra, p. 838).

¹ See previous note.

² *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Daniel v. Davison*, 16 Ves. 249; 17 Ves. 433.

³ where the instrument is a will or codicil, see infra, sec. 12, cl. (*a*), and sec. 30.

⁴ such as 'agreement,' 'contract,'

'coercion,' 'undue influence,' 'fraud,' 'misrepresentation,' and 'mistake.' The definitions in the General Clauses Act, supra pp. 487-489, also apply to the Specific Relief Act.

⁵ Such as an agreement to perform some merely moral or religious duty.

⁶ e. g. damages, the right to dissolve a partnership.

⁷ Chap. I.

⁸ Chaps. II and V.

⁹ Chaps. IX and X.

(d) by determining and declaring the rights of parties otherwise than by an award of compensation¹; or

(e) by appointing a Receiver².

Preventive relief.

6. Specific relief granted under clause (c) of section 5 is called preventive relief.

Relief not granted to enforce penal law.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law³.

¹ Chap. VI.

² Chap. VII. Sec. 5 (which was suggested by § 1881 of the draft N. Y. Civil Code) omits to refer to chaps. III and IV. It might well be repealed.

³ 8 Cal. 168: Draft N. Y. Civil Code, § 1883, which excepts cases of nuisance. See sec. 55 *infra*. Ill. (c) shows that an injunction may be obtained to restrain the publication of

defamatory matter. Though such publication is a criminal offence, it is also an infringement of a civil right. So in India, as in England, the Court may restrain by injunction the commission of criminal acts affecting rights of property which the Court is bound to protect, *Gee v. Pritchard*, 2 Swanst. 413, and other cases cited in Daniell, 1578, note (k).

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(a) Possession of Immoveable Property.

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

Recovery of specific immoveable property.

9. If any person is dispossessed¹ without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit².

Suit by person dispossessed of immoveable property.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government³.

No appeal shall lie from any order or decree passed in any

¹ either wholly or partially. Thus where *A* trespasses on *B*'s property and retains joint possession thereof, *B* may sue under this section, for he is dispossessed to the same extent as *A* has obtained possession, 3 Mad. 250. The possession of which the plaintiff in a suit under this section has been deprived must be a juridical as opposed to a physical possession. A mere trespasser has not acquired what the law understands by possession, and cannot, therefore, have been 'dispossessed,' 7 Bom. H. C., A. C. J. 87, per Melvill J. See also 5 Bom. 446. A jurisdiction in cases of illegal dispossession is given to Mám-latdars by Bom. Act III of 1876, West & B., 3rd ed., 696, n.

² In a summary suit under this

section the plaintiff may sue each of the persons concerned in the ouster and in maintaining the alleged wrongful possession thus acquired, whether immediately or mediately, from the plaintiff, 5 Bom. 208. To such a suit brought by a mortgagee against a mortgagor who has forcibly dispossessed the former, it is no answer to allege that the mortgage and possession thereunder were obtained by the fraud of the mortgagee. The mortgagor should sue to set aside the mortgage and recover possession, 5 Bom. 446.

³ This word is not defined. It would doubtless here be construed as meaning the Secretary of State in Council; see 21 & 22 Vic. c. 106, s. 65.

suit instituted under this section, nor shall any review¹ of any such order or decree be allowed².

(b) *Possession of Moveable Property.*

Recovery
of specific
moveable
property.

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure³.

Explanation 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled⁴.

Explanation 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Illustrations.

(a) *A* bequeaths land to *B* for his life, with remainder to *C*. *A* dies. *B* enters on the land, but *C*, without *B*'s consent, obtains possession of the title-deeds. *B* may recover them from *C*⁵.

(b) *A* pledges certain jewels to *B* to secure a loan. *B* disposes of them before he is entitled to do so. *A*, without having paid or tendered the amount of the loan, sues *B* for possession of the jewels. The suit should be dismissed, as *A* is not entitled to their possession⁶, whatever right he may have to secure their safe custody⁷.

(c) *A* receives a letter addressed to him by *B*. *B* gets back the letter without *A*'s consent. *A* has such a property therein as entitles him to recover it from *B*⁸.

(d) *A* deposits books and papers for safe custody with *B*. *B* loses them and *C* finds them, but refuses to deliver them to *B* when demanded. *B* may recover them from *C*, subject to *C*'s right, if any, under section 168 of the Indian Contract Act, 1872.

(e) *A*, a warehouse-keeper, is charged with the delivery of certain

¹ This does not bar a rehearing under sec. 103 of the Civil Procedure Code, 4 Mad. 218.

² Mere omission of the party dispossessed to avail himself of the provisions of this section is not acquiescence in the dispossessor's act so as to deprive him of his right to rely on his previous possession in an action of ejectment against a trespasser, 8 Bom. 375, 376.

A suit lies under this section where the plaintiff's possession has been partially, as well as where it has been wholly disturbed, 3 Mad. 250.

³ And the defendant has no option to retain the property upon paying

its value. So in England since the C. L. P. Act, 1854, sec. 78.

⁴ Bullen & Leake, p. 414.

⁵ *Lord Buckhurst's Case*, 1 Co. Rep. 2a. The illustration assumes that *B* is not a beneficiary. Otherwise his trustee would be entitled to the deeds. See the Trusts Act, sec. 31, supra, p. 853.

⁶ The bailor must pay or tender before he becomes entitled to the possession.

⁷ *Donald v. Suckling*, L. R., 1 Q. B. 585.

⁸ *Oliver v. Oliver*, 8 Jur., N. S. 512; 11 C. B., N. S. 139.

goods to *Z*, which *B* takes out of *A*'s possession. *A* may sue *B* for the goods¹.

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

(a) when the thing claimed is held by the defendant as the agent or trustee² of the claimant;

(b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed³;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(d) when the possession of the thing claimed has been wrongfully transferred from the claimant⁴.

Illustrations

of clause (a)—*A*, proceeding to Europe, leaves his furniture in charge of *B* as his agent during his absence. *B*, without *A*'s authority, pledges the furniture to *C*, and *C*, knowing that *B* had no right to pledge the furniture⁵, advertises it for sale. *C* may be compelled to deliver the furniture to *A*, for he holds it as *A*'s trustee⁶.

of clause (b)—*Z* has got possession of an idol belonging to *A*'s family, and of which *A* is the proper custodian. *Z* may be compelled to deliver the idol to *A*⁷.

of clause (c)—*A* is entitled to a picture by a dead painter and a pair of rare China vases. *B* has possession of them. The articles are of too special a character to bear an ascertainable market-value. *B* may be compelled to deliver them to *A*⁸.

¹ This illustrates Expl. 2.—*A* having a temporary right to the present possession of the goods. As to the decree in suits under this section, see the Code of Civil Procedure, secs. 208, 259, and as to the measure of damages, *Mayne, Dam.* p. 389.

² *Wood v. Boucliffe*, 2 Phill. 882.

³ This includes two classes of English cases, (a) where the thing in question is unique, where there is, over and above the market value, a *pretium affectionis* (*Fry*, 28), and (b) where, though it is not unique, it possesses a special and peculiar value to the plaintiff (*Fry*, 30). In the latter class of cases the Court will enjoin the possessor of the article not to sell it, *North v. G. N. Ry. Co.*, 2 Giff. 64.

⁴ As to the plaint and decree in suits under this section, see the Code of Civil Procedure, sched. iv, no. 103, and sec. 260.

⁵ If *C* had not this knowledge, the Contract Act, sec. 178, would apply.

⁶ *Wood v. Boucliffe*, 3 Hare, 304.

⁷ *Pusey v. Pusey*, 1 Vern. 273.

⁸ *Duke of Somerset v. Cookson*, 3 P. W. 389; *Lowther v. Lowther*, 13 Ves. 95; *Falcke v. Grey*, 4 Drew. 653. English Courts of Equity have compelled delivery also of family paintings, family plate, a gold snuff-box, farm-stock, mortgage-deeds, account-books, jewels, masonic regalia. A ship is probably within this principle, *Fry*, 28, note 6.

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

(a) Contracts which may be specifically enforced.

Cases in which specific performance enforceable.

12. Except as otherwise provided in this chapter, the specific performance of any contract¹ may in the discretion² of the Court be enforced—

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust³;

(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved⁴.

Illustrations

of clause (a)—*A* holds certain stock in trust for *B*. *A* wrongfully disposes of the stock. The law creates an obligation on *A* to restore the same quantity of stock to *B*, and *B* may enforce specific performance of this obligation⁵.

of clause (b)—*A* agrees to buy, and *B* agrees to sell, a picture by a dead painter and two rare China vases. *A* may compel *B* specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance⁶.

of clause (c)—*A* contracts with *B* to sell him a house for Rs. 1000.

¹ i.e. an agreement enforceable by law; *supra*, p. 547

² See *infra*, sec. 22.

³ whether express, constructive, or resulting, *supra*, p. 946.

⁴ 1 Sim. & St 610.

⁵ *Forest v. Elwes*, 4 Ves. 497; *Pooley v. Budd*, 14 Beav. 34. This illustration is repealed by the Trusts Act, II of 1882, wherever that Act is in force.

⁶ *Falcke v. Grey*, 4 Drew. 651.

B is entitled to a decree directing *A* to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of incorporation, a railway-company contract with *Z* to make an archway through their railway to connect lands of *Z* severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. *Z* is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf¹.

A contracts to sell, and *B* contracts to buy, a certain number of railway-shares of a particular description. *A* refuses to complete the sale. *B* may compel *A* specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured².

A contracts with *B* to paint a picture for *B*, who agrees to pay therefor Rs. 1000. The picture is painted³. *B* is entitled to have it delivered to him on payment or tender of the Rs. 1000.

of clause (*d*)—*A* transfers without endorsement, but for valuable consideration, a promissory note to *B*. *A* becomes insolvent, and *C* is appointed his assignee. *B* may compel *C* to endorse the note, for *C* has succeeded to *A*'s liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless⁴.

13. Notwithstanding anything contained in section 56 of the Indian Contract Act⁵, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Contracts of which the subject has partially ceased to exist.

Illustrations.

(a) *A* contracts to sell a house to *B* for a lăkh of rupees. The day after the contract is made, the house is destroyed by a cyclone. *B* may be compelled to perform his part of the contract by paying the purchase-money⁶.

¹ *Storer v. G. W. Ry. Co.*, 2 Y. & C. N. R. 48, 53. And see *Powell v. G. W. Ry. Co.*, 1 Jur. N. S. 773; *Wilson v. Furness Ry. Co.*, L. R., 9 Eq. 28; *Greene v. W. Cheshire Ry. Co.*, L. R., 13 Eq. 44; *Frith v. Midland Ry. Co.*, L. R., 20 Eq. 100; Dart, 989. This illustration seems to accord with the Scotch practice; Fry, S. P., 989.

² *Duncuft v. Albrecht*, 12 Sim. 189. See Fry, §§ 54; 1468-1501. Specific performance has been granted of con-

tracts for the sale of a barge, a patent, the goodwill of a business sold in connection with the property, Dart, 5th ed. 986.

³ If it had not already been painted, sec. 21, cl. (b) would apply.

⁴ *Watkins v. Maule*, 2 J. & W. 242. As to agreements in the nature of a family compromise, see 8 Moo. I. A. 275.

⁵ *Supra*, p. 579.

⁶ *Paine v. Mellor*, 6 Ves. 349.

(b) In consideration of a sum of money payable by *B*, *A* contracts to grant an annuity to *B* for *B*'s life. The day after the contract has been made, *B* is thrown from his horse and killed. *B*'s representative may be compelled to pay the purchase-money¹.

Specific performance of part of contract where part unperformed is small.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and² admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency³.

Illustrations.

(a) *A* contracts to sell *B* a piece of land consisting of 100 bighás. It turns out that 98 bighás of the land belong to *A*, and the two remaining bighás to a stranger, who refuses to part with them. The two bighás are not necessary⁴ for the use or enjoyment of the 98 bighás, nor so important for such use or enjoyment that the loss of them may not be made good in money. *A* may be directed at the suit of *B* to convey to *B* the 98 bighás and to make compensation to him for not conveying the two remaining bighás; or *B* may be directed, at the suit of *A*, to pay to *A* on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(b) In a contract for the sale and purchase of a house and lands for two lákhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house⁵.

Specific performance of part of contract where part unperformed is large.

15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or⁶ does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may⁷, at the suit of the other party, direct the party in default to

¹ *Mortimer v. Capper*, 1 Bro. C. C. 156.

² not 'or,' as in sec. 15.

³ Taken from the Law Commissioners' Draft Contract Law, cl. 53. The drafting is not quite accurate. See in England, Dart, 1065, and the *Law Quarterly Review*, Jan. 1887, p. 54.

⁴ If they were necessary, specific performance would not be decreed against *B*; *Peers v. Lambart*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193.

⁵ *Richardson v. Smith*, L. R., 5 Chan. 648.

⁶ not 'and,' as in sec. 14.

⁷ in its discretion, sec. 22, II, *infra*.

perform specifically so much of his part of the contract as he can perform, provided that the plaintiff¹ relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant².

Illustrations.

(a) *A* contracts to sell to *B* a piece of land consisting of 100 bighás. It turns out that 50 bighás of the land belong to *A*, and the other 50 bighás to a stranger, who refuses to part with them. *A* cannot obtain a decree against *B* for the specific performance of the contract; but if *B* is willing to pay the price agreed upon, and to take the 50 bighás which belong to *A*, waiving all right to compensation either for the deficiency or for loss sustained by him through *A*'s neglect or default, *B* is entitled to a decree directing *A* to convey those 50 bighás to him on payment of the purchase-money.

(b) *A* contracts to sell to *B* an estate with a house and garden for a lách of rupees. The garden is important for the enjoyment of the house. It turns out that *A* is unable to convey the garden. *A* cannot obtain a decree against *B* for the specific performance of the contract; but if *B* is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through *A*'s neglect or default, *B* is entitled to a decree directing *A* to convey the house to him on payment of the purchase-money.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot³ or ought not⁴ to be specifically performed, the Court may direct specific performance of the former part.

17. The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections⁵.

¹ being the buyer.

² Taken from the Law Commissioners' Draft Contract Law, cl. 54. Other illustrations are, *Earl of Durham v. Legard*, 34 L. J., Ch. 589, where the estate was supposed to contain 21,750 acres, but in fact contained only 11,814; and *Maw v. Topham*, 19 Beav. 576, where the vendors were only entitled to three-fourths.

The Act does not empower a vendor in case of essential misdescription,

where compensation cannot be assessed, to compel specific performance with an indemnity. See *Balmarino v. Lumley*, 1 Ves. & B. 224, and Fry, 522. But see *Milligan v. Cooke*, 16 Ves. 1, where a vendor was compelled to give an indemnity.

³ i.e. which becomes impossible.

⁴ from its having become illegal or for any other reason.

⁵ Law Commissioners' Draft Contract Law, cl. 55, L. R., 12 Eq. 23. The

Specific performance of independent part of contract.

Bar in other cases of specific performance of part.

Purchaser's rights against vendor with imperfect title.

18. Where a person contracts to sell or let certain property¹, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—

(a) if the vendor or lessor² has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest³;

(b) where the concurrence of other persons is necessary to validate the title, and they are bound⁴ to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;

(c) where the vendor professes⁵ to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee⁶;

(d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let⁷.

Power to award compensation in certain cases.

19. Any person suing for the specific performance of a contract, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance⁸.

object of this section is, as Mr. Collett suggests, to prevent that remodelling of contracts which has been sometimes carried to excess in English cases. See *Osborne v. Smith*, 6 H. L. Ca. 391. It covers the English cases in which specific performance has been refused where there has been misdescription regarding the identity, tenure, or situation of the subject-matter of the contract.

¹ whether immovable or moveable. The section does not apply to mortgages or exchanges.

² or any one claiming under him, see *infra*, sec. 27, cl. (b), (c).

³ 8 Cal. 144: the subsequently acquired interest feeds (as English lawyers say) the estoppel, *Ascough v. Johnson*, 2 Vern. 66. For the converse case, see *Murrell v. Goodyear*, 1 D. F. & J. 432.

⁴ i. e. under a legal obligation.

⁵ i. e. represents, either expressly or by implication. See *Averall v. Wade*, Lloyd & G., temp. Sug. 261.

⁶ of such interest as he has under the mortgage.

⁷ *Turner v. Marriott*, L. R., 3 Eq. 744: *Middleton v. Magnay*, 2 Hem. & M. 233.

⁸ 21 & 22 Vic. c. 27: 8 Cal. 963.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation ¹ accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct ².

Explanation.—The circumstance that the contract has become incapable ³ of specific performance does not preclude the Court from exercising the jurisdiction ⁴ conferred by this section.

Illustrations

of the second paragraph :—*A* contracts to sell a hundred maunds of rice to *B*. *B* brings a suit to compel *A* to perform the contract or to pay compensation. The Court is of opinion that *A* has made a valid contract and has broken it, without excuse, to the injury of *B*, but that specific performance is not the proper remedy ⁵. It shall award to *B* such compensation as it deems just.

of the third paragraph :—*A* contracts with *B* to sell him a house for Rs. 1000, the price to be paid and the possession given on the 1st January 1877. *A* fails to perform his part of the contract, and *B* brings his suit for specific performance and compensation, which is decided in his favour on the 1st January 1878. The decree may, besides ordering specific performance, award to *B* compensation for any loss which he has sustained by *A*'s refusal ⁶.

Sec. 19 must be read in connexion with sec. 29 infra. In England the right to damages may be forfeited by the plaintiff's laches, 8 Jur. N. S. 873.

¹ but not an indemnity.

² i. e. by taking an account, issuing a commission (Code of Civ. P. sec. 392), or directing an inquiry. Cf. 21 & 22 Vic. c. 27, ss. 3, 6. In India, as in England (Ord. 36, R. 58), in respect of any continuing cause of action, the damages should be assessed down to the time of the assessment. As to the measure of damages, the Court of course is bound by the rules applicable

to the contract in question, and section 19 (like Lord Cairns' Act, 21 & 22 Vic. c. 27, on which it is founded) gives no right to damages where they could not have been previously recovered, *The Rock Portland Cement Co. v. Wilson*, 52 L. J., Ch. 214.

³ from the default of either party, as where the vendor has since the date of the contract for sale sold the property to another for value without notice.

⁴ to award compensation.

⁵ The proper remedy is a suit for damages, sec. 21, cl. a.

⁶ Taken from the Law Commis-

of the Explanation:—*A*, a purchaser, sues *B*, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award *A* compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose¹.

A sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award *A* compensation for the non-performance².

Liquida-
tion of
damages
not a bar
to specific
perform-
ance.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same³.

Illustration.

A contracts to grant *B* an underlease of property held by *A* under *C*, and that he will apply to *C* for a licence necessary to the validity of the underlease, and that, if the licence is not procured, *A* will pay *B* Rs. 10,000. *A* refuses to apply for the licence and offers to pay *B* the Rs. 10,000. *B* is nevertheless entitled to have the contract specifically enforced if *C* consents to give the licence⁴.

(b) Contracts which cannot be specifically enforced.

Contracts
not speci-
fically en-
forceable.

21. The following contracts cannot be specifically enforced:—

(a) a contract for the non-performance of which compensation in money is an adequate relief⁵;

(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties⁶, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms⁷;

(c) a contract the terms of which the Court cannot find with reasonable certainty⁸;

sioners' Draft, cl. 82, ill. (j). *Lillie v. Leigh*, De G. & J. 204.

¹ *Ferguson v. Wilson*, L. R., 2 Ch. 77.

² Contra, *Ferguson v. Wilson*, L. R., 2 Ch. Ap. 77.

³ Draft N. Y. Civil Code, § 1892. Compare the Contract Act, sec. 74.

⁴ *Long v. Bowring*, 33 Beav. 585.

⁵ 2 Mad. 79 (contract to lend money on mortgage); 1 Cal. 74 (contract to give a girl in marriage).

⁶ 6 Bom. 282, 283. See Fry, §§ 87-91.

⁷ That a mere agreement to adopt and a contract of betrothal will probably not be specifically enforced, see West & B. 1090, citing 7 Bom. H. C., O. C. J. 122; 1 Cal. 74. Whether an agreement for the sale of a medical practice can be specifically enforced, see *May v. Thomson*, 20 Ch. D. 705.

⁸ Dart, 1033, and see 3 Cal. 464:

(d) a contract which is in its nature revocable¹;

(e) a contract made by trustees either in excess of their powers or in breach of their trust²;

(f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;

(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date³;

(h) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist⁴.

And save as provided by the Code of Civil Procedure⁵, no contract to refer a controversy to arbitration shall be specifically enforced⁶; but if any person who has made such a

5 All. 44. As to the remedy where the instrument of contract is lost, *ibid.* 52. Where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court would take the usual means of ascertaining it, and decree performance of the contract accordingly. Where the value must be to a great extent matter of guess, as in the case of land supposed to contain coal or other minerals, the Court must do its best to determine the value, 5 Cal. 937. English cases illustrating clause (c) will be found in 1 De G. M. & G. 80; 3 id. 24; 5 id. 880; 7 id. 328; and see *Harvey v. Principal &c. of Barnard's Inn*, 50 L. J., Ch. 750; *Marshall v. Berridge*, 19 Ch. D. 233. Where an agreement has been in part performed, the Court struggles to overcome a difficulty in the way of its specific enforcement arising from vagueness in the terms, *Hart v. Hart*, 18 Ch. D. 670.

¹ Fry, §§ 72-75.

² *Dunn v. Dunn*, 28 Ch. D. 586; *Thompson v. Buckstone*, 6 Beav. 470. If the Court knows that the seller is a trustee having power to sell only under certain circumstances, it should not decree specific performance of the contract of sale without having at least some proof of the existence of such circumstances. Where therefore a

suit is brought against the father of an undivided Hindú family having a minor son, for the specific performance of a contract to sell land presumably ancestral, the Court having thereby notice that the vendor's powers can be exercised without a breach of trust only where there exists a necessity sufficient in law to justify the sale, and that the minor is entitled to forbid the sale, is bound to require the plaintiff to give some proof of the necessity, 5 Mad. 341. Where it is doubtful whether the manager of certain endowed property has power to grant a *patni* lease thereof, the Court refused to enforce against him a contract for the grant of such a lease, 1 Suth. Civ. R. 4.

³ 2 Dru. & W. 80; L. R., 1 Ch. 117; 2 D. J. & G. 475. Fry, § 67, as to contracts to be performed by instalments.

⁴ Compare the Contract Act (*supra* p. 557), sec. 20.

⁵ Secs. 523-526.

⁶ The reason is that the Court could not make an effective decree if the parties would not name an arbitrator, or if he died, or became incapable, or refused to act. So in England. The rest of the clause imposes 'a kind of moral pressure to prevent people who had entered into contracts to refer to arbitration from breaking them willfully and capriciously' (Mr. Hobhouse,

contract and has refused to perform it¹, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit².

Illustrations

to (a)—*A* contracts to sell, and *B* contracts to buy, a lakh of rupees in the four per cent. loan of the Government of India³:

A contracts to sell, and *B* contracts to buy, 40 chests of indigo at Rs. 1000 per chest:

In consideration of certain property having been transferred by *A* to *B*, *B* contracts to open a credit in *A*'s favour to the extent of Rs. 10,000, and to honour *A*'s drafts to that amount⁴.

The above contracts cannot be specifically enforced, for, in the first and the second both *A* and *B*, and in the third *A*, would be reimbursed by compensation in money.

to (b)—*A* contracts to render personal service to *B*⁵:

A contracts to employ *B* on personal service:

A an author, contracts with *B*, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

A contracts to buy *B*'s business at the amount of a valuation to be made by two valuers, one to be named by *A* and the other by *B*. *A* and *B* each name a valuer, but before the valuation is made, *A* instructs his valuer not to proceed⁶:

By a charter-party entered into in Calcutta between *A*, the owner of a ship, and *B*, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London⁷:

A lets land to *B* and *B* contracts to cultivate it in a particular manner for three years⁸ next after the date of the lease⁹:

Proceedings of the Council, 22 Nov. 1876).

¹ 5 Cal. 498. The mere act of instituting a suit for part of the subject-matter referred is not tantamount to such a refusal, 8 All. 57, 61.

² 4 All. 548. Compare 17 & 18 Vic. c. 125, sec. 11.

³ *Cud v. Rutter*, 1 P. Wms. 570.

⁴ *Larios v. Bonany*, L. R., 5 P. C. 346. So if *B* a banker, having funds of his customer *A* in hand, refuses to cash *A*'s cheques when duly presented, *Margetti v. Williams*, 1 B. & Ad. 415. So where *B* contracts to lend a sum of money, *Sichel v. Mosenthal*, 8 Jur. N. S. 275, or to do something unconnected with property, *Rigby v.*

Connol, 14 Ch. D. 487.

⁵ Sec. 57, ill. (d) *infra*: L. R., 1 Eq. 411.

⁶ *Vickers v. Vickers*, L. R., 4 Eq. 529. Here the contract is only inchoate until the price is fixed. It is otherwise where the provision as to valuing is merely subsidiary.

⁷ See *Le Blanch v. Granger*, 35 Beav. 187, where the M. R. held that, though the Court could not decree specific performance of a charterparty, it could restrain the employment of a ship in a manner inconsistent with the rights given by the contract.

⁸ Where the term is more than three years clause (g) applies.

⁹ *Rayner v. Stone*, 2 Eden, 128.

A and *B* contract that, in consideration of annual advances to be made by *A*, *B* will for three years¹ next after the date of the contract grow particular crops on the land in his possession and deliver them to *A* when cut and ready for delivery:

A contracts with *B* that, in consideration of Rs. 1,000 to be paid to him by *B*, he will paint a picture for *B*²:

A contracts with *B* to execute certain works which the Court cannot superintend³:

A contracts to supply *B* with all the goods of a certain class which *B* may require⁴:

A contracts with *B* to take from *B* a lease of a certain house for a specified term, at a specified rent, 'if the drawing-room is handsomely decorated,' even if it is held to have so much certainty that compensation can be recovered for its breach⁵:

A contracts to marry *B*.

The above contracts cannot be specifically enforced⁶.

to (c).—*A*, the owner of a refreshment-room, contracts with *B* to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. *A* refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined⁷.

to (d).—*A* and *B* contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership⁸. This contract cannot be specifically performed, for, if it were so performed, either *A* or *B* might at once dissolve the partnership⁹.

to (e).—*A* is a trustee of land with power to lease it for seven years. He enters into a contract with *B* to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced¹⁰.

The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

¹ Where the term is more than three years, clause (g) applies.

² See sec. 12, cl. (c), and the second illustration.

³ *Peto v. Brighton &c. Ry. Co.*, 1 H. & M. 468.

⁴ *Hills v. Croll*, 1 D. M. G. 627 n., S. C. 2 Ph. 60.

⁵ *Taylor v. Portington*, 7 D. M. & G. 328.

⁶ As regards the illustration about the charter-party these words require to be limited to enforcement at the suit of *A*.

⁷ *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119.

⁸ But where the contract defines

the duration, and there has been part-performance, the Court may specifically execute it, *England v. Curling*, 8 Beav. 129.

⁹ 1 Mad. H. C. 341, 347: *Scott v. Rayment*, L. R., 7 Eq. 112, and see Fry, 641. So in the case of every contract where the defendant has an option of revoking, Fry, §§ 72-75. So where it is in the power of a third person to destroy the title, the Court will not enforce a contract for sale at the instance of the vendor, see *Brewer v. Broadwood*, 22 Ch. D. 105.

¹⁰ *Mortlock v. Buller*, 10 Ves. 292.: *Harnett v. Yielding*, 2 Sch. & Lef. 549.

Two trustees, *A* and *B*, empowered to sell trust-property worth a lăkh of rupees, contract to sell it to *C* for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. *C* cannot enforce its specific performance¹.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced².

to (*f*).—*A* company existing for the sole purpose of making and working a railway, contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced³.

to (*g*).—*A* contracts to let for twenty-one years to *B* the right to use such part of a certain railway made by *A* as was upon *B*'s land, and that *B* should have a right of running carriages over the whole line on certain terms, and might require *A* to supply the necessary engine-power, and that *A* should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to *B*⁴.

to (*h*).—*A* contracts to pay an annuity to *B* for the lives of *C* and *D*. It turns out that, at the date of the contract, *C*, though supposed by *A* and *B* to be alive, was dead. The contract cannot be specifically performed⁵.

(c) Of the Discretion of the Court.

Discretion
as to de-
creeing
specific per-
formance.

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal⁶.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation⁷ on the plaintiff's part.

¹ *Mortlock v. Buller*, 10 Ves. 292.

² See *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918.

³ It is *ultra vires*.

⁴ *Blackett v. Bates*, L. R., 1 Ch. App. 117.

⁵ As to the defence by a purchaser on the ground of mistake, see

Goddard v. Jeffreys, 51 L. J., Ch. 57.

⁶ *White v. Damon*, 7 Ves. 30, 35; *Goring v. Nash*, 3 Atk. 186, 187; *Haywood v. Cope*, 25 Beav. 140; Fry, § 25. As to the plaintiff's delay as a defence, 10 Cal. 1061.

⁷ Where there is fraud or misrepresentation, see secs. 26, 28, *infra*.

Illustrations.

(a) *A*, a tenant for life of certain property, assigns his interest therein to *B*. *C* contracts to buy, and *B* contracts to sell, that interest. Before the contract is completed, *A* receives a mortal injury from the effects of which he dies the day after the contract is executed. If *B* and *C* were equally ignorant or equally aware of the fact, *B* is entitled to specific performance of the contract. If *B* knew the fact, and *C* did not, specific performance of the contract should be refused to *B*¹.

(b) *A* contracts to sell to *B* the interest of *C* in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that *C*'s interest is worth nothing. In fact the value of *C*'s interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to *A*, but not to *B*. Specific performance of the contract should be refused to *A*².

(c) *A* contracts to sell, and *B* contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. *B* does not know of this circumstance, and *A* conceals³ it from him. Specific performance of the contract should be refused to *A*⁴.

(d) *A*'s property is put up to auction. *B* requests *C*, *A*'s attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should be refused to *B*⁵.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations.

(e) *A* is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to *B*. *A*, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to *C*. Here, the enforcement of the contract would operate so harshly on *A*, that the Court will not compel its specific performance in favour of *C*⁶.

¹ *Ellard v. Lord Llandaff*, 1 B. & B. 241.

² See *Smith v. Harrison*, 26 L. J., Ch. 412, where the Court set aside the sale.

³ i.e. actively conceals.

⁴ *Shirley v. Stratton*, 1 Bro. C. C. 440.

⁵ *Twining v. Morrice*, 2 Bro. C. C. 326. As to pretended biddings, see the Contract Act, sec. 123, *supra*, p. 610.

⁶ *Faine v. Brown*, cited in 2 Ves. Sen. 307: *Webb v. Direct London & Portsmouth Ry. Co.*, 1 D. M. G. 521. Except under special circumstances,

(f) *A* and *B*, trustees, join their beneficiary, *C*, in a contract to sell the trust-estate to *D*, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to *D*¹.

(g) *A*, the owner of an estate, contracts to sell it to *B*, and stipulates that he, *A*, shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be part of it. Specific performance of the contract should be refused to *B*, unless he waives his claim to the unknown property².

(h) *A* contracts with *B* to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that *A* cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to *B*, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road³.

(i) *A*, a lessee of mines, contracts with *B*, his lessor, that at any time during the continuance of the lease *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*⁴.

(j) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*⁵.

(k) *A* contracts with *B* to buy from *B*'s manufactory and not elsewhere all the goods of a certain class used by *A* in his trade. The Court cannot compel *B* to supply the goods, but if he does not supply them, *A* may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*⁶.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

a party will not be compelled to do an act subjecting him to a forfeiture, see *Peacock v. Penson*, 11 Beav. 355. But see *Helling v. Lumley*, 3 De G. & J. 493.

¹ *Wedgwood v. Adams*, 6 Beav. 600; 8 Beav. 103.

² See *Baxendale v. Seale*, 19 Beav. 601.

³ *Peacock v. Penson*, 11 Beav. 355.

⁴ See *Talbot v. Ford*, 13 Sim. 173.

⁵ *Denne v. Light*, 26 L. J., Chan.

459.

⁶ *Hills v. Croll*, 2 Phill. 60.

Illustration.

A sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A¹.

(d) For whom Contracts may be specifically enforced.

23. Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

Who may
obtain
specific per-
formance.

(a) any party thereto;

(b) the representative in interest², or the principal, of any party thereto: provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed;

(c) where the contract is a settlement on marriage, or a compromise³ of doubtful rights between members of the same family⁴, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman⁵;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant⁶;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach⁷;

(g) when a public company has entered into a contract and subsequently becomes amalgamated with another public

¹ *Storer v. G. W. Ry. Co.*, 2 Y. & C. C. C. 48.

² Such as alienees *inter vivos*, assignees in insolvency, committees in lunacy, executors or administrators.

³ A reasonable compromise is intended, not one in which an undue advantage was taken by one of the members of another.

⁴ *Stapilton v. Stapilton*, 2 W. & T. L. C., 6th ed. 920. The clause should have extended to all compromises of doubtful claims.

⁵ See *Ricketts v. Bell*, 1 De G. & S. 335; Dart, 995.

⁶ 32 Hen. VIII, c. 34: Fry, 69.

⁷ *Johnstone v. Hall*, 2 K. & J. 414: Fry, 69.

company, the new company which arises out of the amalgamation¹;

(*λ*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company².

(*e*) *For whom Contracts cannot be specifically enforced.*

Personal
bars to the
relief.

24. Specific performance of a contract cannot be enforced in favour of a person—

(*a*) who could not recover compensation for its breach³;

(*b*) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;

(*c*) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract⁴; or

(*d*) who, previously to the contract, had notice that a settlement⁵ of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force⁶.

Illustrations

to clause (*a*).—*A*, in the character of agent for *B*, enters into an agreement with *C* to buy *C*'s house. *A* is in reality acting, not as agent for *B*, but on his own account. *A* cannot enforce specific performance of this contract⁷.

to clause (*b*).—*A* contracts to sell *B* a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. *A* becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract⁸.

A contracts to sell *B* a house and garden in which there are ornamental trees, a material element in the value of the property

¹ Fry, 96.

² *Edwards v. Grand Junction Ry. Co.*, 1 My. & Cr. 650: Fry, chap. v.

³ See Dart, 1061.

⁴ Dart, 1085, 1089: see *Saintier v. Ferguson*, 1 Mac. & G. 286.

⁵ Sec. 3, *supra*, p. 946.

⁶ 'in force' does not necessarily mean in active operation. Clause (*c*), sec. 25 is the correlative of clause (*d*), sec. 24.

⁷ See the Contract Act, sec. 236, *supra*, p. 645: *Phillips v. Duke of*

Bucks., 1 Vern. 227. Where the enforcement of the contract would involve a fraud on the public (as where the defendant's name was to appear as the editor on the title-page of a book with which he had nothing to do), performance will be refused, *Post v. Marsh*, 16 Ch. D. 395.

⁸ 1 Y. & C. 228: *Neale v. Mackenzie*, 1 Keen, 484. There must be such proof of general insolvency as the Court can act upon.

as a residence. *A*, without *B*'s consent, fells the trees. *A* cannot enforce specific performance of the contract.

A, holding land under a contract with *B* for a lease, commits waste, or treats the land in an unhusbandlike manner. *A* cannot enforce specific performance of the contract¹.

A contracts to let, and *B* contracts to take, an unfinished house, *B* contracting to finish the house and the lease to contain covenants on the part of *A* to keep the house in repair. *B* finishes the house in a very defective manner: he cannot enforce the contract specifically, though *A* and *B* may sue each other for compensation for breach of it².

to clause (c).—*A* contracts to let, and *B* contracts to take, a house for a specified term at a specified rent. *B* refuses to perform the contract. *A* thereupon sues for, and obtains, compensation for the breach. *A* cannot obtain specific performance of the contract³.

25. A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the same⁴;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt;

(c) who, previous to entering into the contract, has made a settlement⁵ (though not founded on any valuable consideration) of the subject-matter of the contract⁶.

Contracts to sell property by one who has no title, or who is a voluntary settlor.

Illustrations.

(a) *A*, without *C*'s authority, contracts to sell to *B* an estate which *A* knows to belong to *C*. *A* cannot enforce specific performance of this contract, even though *C* is willing to confirm it.

¹ Fry, 420.

² *Tildesley v. Clarkson*, 30 Beav. 419.

³ *Sainter v. Ferguson*, 1 Mac. & G. 286.

⁴ Sugd. V. & P. 12th ed. 241, note (p). Notwithstanding this clause, Mr. Collett, 157, thinks that if *A* contracts to sell an estate which he knows to be *B*'s and afterwards acquires a title, *A* may enforce specific performance if the time fixed for completion

has not passed. This is contrary to the intention of the legislature, which meant to lay down a rule in accordance with the view apparently held by Knight Bruce V.C. in *Adams v. Brooke*, 1 Y. & C. C. 627, 630. See however Dart, 1058.

⁵ Sec. 3, supra, p. 946.

⁶ See clause (d), sec. 24. Equity refuses to interfere where the contract contravenes the rights of a third party, *Smith v. Garland*, 2 Mer. 123.

(b) *A* bequeaths his land to trustees, declaring that they may sell it with the consent in writing of *B*. *B* gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with *C* to sell him the land. *C* refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of *B*'s consent to the particular sale to *C*, the title which they can give *C* is, as the law stands, not free from reasonable doubt¹.

(c) *A*, being in possession of certain land, contracts to sell it to *Z*. On enquiry it turns out that *A* claims the land as heir of *B*, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. *A* cannot compel *Z* specifically to perform the contract.

(d) *A*, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. *A* cannot enforce specific performance of this contract so as to override the settlement, and thus prejudice the interests of the persons claiming under it².

(f) *For whom Contracts cannot be specifically enforced except with a variation.*

Non-enforcement except with variation.

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, (namely):—

(a) where by fraud³ or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed⁴ it to be when he entered into it;

(b) where by fraud³, mistake of fact, or surprise⁵ the defendant entered into the contract under a reasonable misapprehension⁶ as to its effect as between himself and the plaintiff;

(c) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipu-

¹ See *Sykes v. Sheard*, 9 Jur., N. S. 1262; *Mullings v. Trinder*, L. R., 10 Eq. 449.

² *Johnson v. Legard*, T. & R. 281. But see *Peter v. Nicolls*, L. R., 11 Eq. 396, where the defendant was a willing purchaser.

³ Contract Act, sec. 17: 'misrepresentation' (*ibid.* sec. 18) is omitted *per incuriam*.

⁴ whether reasonably or not.

⁵ *Story*, Eq. Jur. 120, note, 251. The surprise must have been induced by some faulty conduct of the plaintiff not amounting to actual fraud.

⁶ i.e. such as a man of ordinary capacity, and using ordinary caution, might still in the circumstances have fallen into, *Collett*, 164.

lation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil¹:

(d) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

(e) where the parties have, subsequently to the execution of the contract, contracted to vary it².

Illustrations.

(a) *A*, *B* and *C* sign a writing by which they purport to contract each to enter into a bond to *D* for Rs. 1,000. In a suit by *D*, to make *A*, *B* and *C* separately liable each to the extent of Rs. 1,000, they prove that the word 'each' was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. *D* can obtain the performance sought only with the variation thus set up³.

(b) *A* sues *B* to compel specific performance of a contract in writing to buy a dwelling-house. *B* proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by *B*⁴.

(c) *A* contracts in writing to let to *B* a wharf, together with a strip of *A*'s land delineated in a map. Before signing the contract, *B* proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of *A*'s land of the same dimensions, and to this *A* expressly assented. *B* then signed the written contract. *A* cannot obtain specific performance of the written contract, except with the variation set up by *B*⁵.

(d) *A* and *B* enter into negotiations for the purpose of securing land to *B* for his life, with remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on *B*. The contract so framed cannot be specifically enforced.

(e) *A* contracts in writing to let a house to *B*, for a certain

¹ i. e. some condition in favour of the defendant agreed to by the plaintiff, which he refuses to fulfil, 6 Cal. 337. Clause (c) enables the defendant (notwithstanding the Evidence Act, secs. 91, 92) to prove an oral agreement for reconveyance, in bar of the plaintiff's conveyance, 4 Bom. 607. As to clauses (a), (b) and (c), see Dart's *Vendors and Purchasers*, ed. 5, pp. 1037-1039, from which they were taken.

² *Wooliam v. Hearn*, 2 W. & T. L. C., 6th ed. 508. Of course the plaintiff need not submit to the variation. He

may take, instead of specific performance, damages for breach of the contract. Where the defendant avails himself of the variation by way of defence, he may as plaintiff sue to rectify the contract and then apply to have the rectified contract specifically enforced (sec. 34).

³ *Gordon v. Hertford*, 2 Maddock, 106.

⁴ See *Moxey v. Bigwood*, 8 Jur. N. S. 803; *Watson v. Marston*, 4 D. M. & G. 230.

⁵ *Clarke v. Grant*, 14 Ves. 519.

term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with *B*'s consent, *A* pulls it down and erects a new house in its place, *B* contracting orally to pay rent at Rs. 120 per mensem. *B* then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract¹.

(g) *Against whom Contracts may be specifically enforced.*

Relief
against
parties and
persons
claiming
under them
by subse-
quent title.

27. Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

(a) either party thereto;
(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract²;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant³;

(d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation⁴;

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company had ratified and adopted the contract and the contract is warranted by the terms of the incorporation⁵.

Illustrations

to clause (b).—*A* contracts to convey certain land to *B* by a particular day. *A* dies intestate before that day without having

¹ *Legal v. Miller*, 2 Ves. Sen. 299: *Price v. Dyer*, 17 Ves. 364.

² Such as assignees in insolvency, judgment-creditors, transferees for value who bought with notice, executors or administrators, Dart, 990; and see 1 All. 556: 3 All. 706: 6 Cal. 538. Clause (b) shows that, where a party has notice of a prior contract for sale, he cannot, by any purchase that he may subsequently make, override it, 10 Cal. 712. For English cases, see *Daniel v. Davison*, 16 Ves. 249: 17

id. 433: *Taylor v. Stibbert*, 2 ib. 437.

³ Such as voluntary alienees or joint-tenants claiming by survivorship, Dart, 997. For 'defendant' the words 'other party to the contract' should (as Mr. Collett points out) be substituted.

⁴ Fry, 96: Lindley on Partnership, Bk. II. c. 2, sec. 2.

⁵ *Earl of Shrewsbury v. North Staffordshire Ry. Co.*, L. R., 1 Eq. 593, 613, per Kindersley V.C.

conveyed the land. *B* may compel *A*'s heir or other representative in interest to perform the contract specifically.

A contracts to sell certain land to *B* for Rs. 5,000. *A* afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract. *B* may enforce specific performance of the contract as against *C*¹.

A contracts to sell land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no enquiry of *B* relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*.

A contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to *B*. Immediately after the contract *A* dies intestate, and *C* takes out administration to his estate. *B* may enforce specific performance of the contract against *C*.

A contracts to sell certain land to *B*. Before the completion of the contract, *A* becomes a lunatic and *C* is appointed his committee. *B* may specifically enforce the contract against *C*².

to clause (c).—*A*, the tenant for life of an estate, with remainder to *B*, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to *C*, who has notice of the settlement. Before the sale is completed, *A* dies. *C* may enforce specific performance of the contract against *B*³.

A and *B* are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. *A* contracts to sell his moiety to *C* and dies. *C* may enforce specific performance of the contract against *B*.

(h) *Against whom Contracts cannot be specifically enforced.*

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:—

What parties cannot be compelled to perform.

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff⁴;

(b) if his assent was obtained by the misrepresentation⁵ (whether wilful or innocent), concealment⁶, circumvention⁷, or unfair practices⁸, of any party to whom performance would

¹ *Daniels v. Davison*, 16 Ves. 249.

² Shelford on Lunatics, 564. See Act XXXIV of 1858, sec. 20.

³ *Mortlock v. Buller*, 10 Ves. 315.

⁴ *Falcke v. Gray*, 4 Drew. 651: Dart, 1080.

⁵ Contract Act, sec. 18: *Clermont v. Tasburgh*, 1 Jac. & W. 112: *Price v. Macaulay*, 2 D. M. & G. 339. As

to misrepresentations which will not serve as defences, see *Goddard v. Jeffreys*, 51 L. J., Ch. 57.

⁶ *Shirley v. Stratton*, 1 Bro. C. C. 440.

⁷ *Phillips v. Duke of Bucks.*, 1 Vern. 227.

⁸ *O'Rourke v. Percival*, 2 Ball & B. 62.

become due under the contract¹, or by any promise of such party² which has not been substantially fulfilled³;

(c) if his assent was given⁴ under the influence of mistake of fact⁵, misapprehension⁶ or surprise⁷. Provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced⁸.

Illustrations

to clause (c).—*A*, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to *B* of his testator's property. *B* cannot insist on the sale being completed⁹.

A directs an auctioneer to sell certain land. *A* afterwards revokes the auctioneer's authority as to 20 bighás of this land, but the auctioneer inadvertently sells the whole to *B*, who has not notice of the revocation. *B* cannot enforce specific performance of the agreement¹⁰.

(i) The effect of dismissing a Suit for Specific Performance.

Bar of suit
for breach
after dis-
missal.

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

(j) Awards and Directions to execute Settlements.

Awards
and di-
rections
to execute
settle-
ments.

30. The provisions of this chapter as to contracts shall, *mutatis mutandis*, apply to awards¹¹ and to directions in a will or codicil to execute a particular settlement¹².

¹ This will include an agent.

² i. e. a contemporaneous promise not comprised in the contract.

³ *Myers v. Watson*, 1 Sim. N. S. 523.

⁴ Not 'obtained.'

⁵ Contract Act, secs. 20-22. The mistake must be as to a matter of fact essential to the agreement, Collett, 183. See *Malins v. Freeman*, 2 Keen, 25; *Webster v. Cecil*, 30 Beav. 62.

⁶ This can hardly mean misapprehension of law. Cf. Contract Act, sec. 21, supra, p. 558, and see *Hamilton v. Grant*, 3 Dow. 33; *Ricketts v. Bell*, 1 De G. & S. 346.

⁷ See supra, sec. 26, cl. (b).

⁸ Founded on § 1894 of the draft N. Y. Civil Code.

⁹ *Sneeby v. Thorne*, 7 D. M. & G. 399. See the Succession Act, sec. 271.

¹⁰ *Manser v. Back*, 6 Hare, 443.

¹¹ No express exception is made as to awards simply to pay money (3 P. Wms. 190, n.). But see supra, sec. 21, cl. (a). Of course the award must not be excessive or defective. The Limitation Act, Sched. II, no. 113, applies to suits to enforce specific performance of awards, 5 All. 263. See the Code of Civil Procedure, c. 37.

¹² Sec. 3, supra, p. 946. See Jarman on Wills, 4th ed., ii. 344; Peachey on Settlements, 103-131.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS¹.

31. When, through fraud or a mutual mistake² of the parties, a contract or other instrument in writing does not truly express their intention³, either party, or his representative in interest, may institute a suit to have the instrument rectified⁴; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument⁵, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value⁶.

Illustrations.

(a) *A*, intending to sell to *B* his house and one of three godowns adjacent to it, executes a conveyance prepared by *B*, in which, through *B*'s fraud, all three godowns are included. Of the two godowns which were fraudulently included, *B* gives one to *C* and lets the other to *D* for a rent, neither *C* nor *D* having any knowledge of the fraud. The conveyance may, as against *B* and *C*, be rectified so as to exclude from it the godown given to *C*; but it cannot be rectified so as to affect *D*'s lease⁷.

(b) By a marriage-settlement, *A*, the father of *B*, the intended wife, covenants with *C*, the intended husband, to pay to *C*, his executors, administrators and assigns, during *A*'s life, an annuity of Rs. 5,000. *C* dies insolvent and the official assignee claims the annuity from *A*. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for *B* and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity⁸.

¹ This chapter is founded on the draft New York Civil Code, articles 1899-1902. Lord Justice Fry treats the subject in his chapter (xv) on Mistake.

² For a case in which an instrument drawn up under a mistake as to its legal effect was reformed, see *Walker v. Armstrong*, 8 De G. M. & G. 531.

³ i.e. their intention as to the meaning and legal effect of the instrument

at the time of its execution, *Wilkinson v. Nelson*, 7 Jur. N. S. 480.

⁴ 8 Cal. 118.

⁵ *Breadalbane v. Chandos*, 2 Myl. & K. 711, 739.

⁶ i.e. purchasers for valuable consideration without notice.

⁷ *D* being a purchaser for value without notice. This illustration is from the Law Commissioners' sixth report, cl. 12.

⁸ *Pearce v. Verbeke*, 2 Beav. 333.

Intent of parties.

32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principles of rectification.

33. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be¹.

Specific enforcement of rectified contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

Illustration.

A contracts in writing to pay his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties².

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS³.

When rescission may be adjudged.

35. Any person interested in a contract⁴ in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:—

(a) where the contract is voidable⁵ or terminable by the plaintiff⁶;

¹ *Walker v. Armstrong*, 8 De G. M. & G. 531.

² *Siedman v. Collett*, 17 Beav. 608.

³ This chapter is taken for the most part from the draft N. Y. Civil Code, the framers of which remark that the discretion of the Court as to costs [see, in India, the Code of Civil Procedure, sec. 220] is a sufficient check upon frivolous suits for rescission.

⁴ A member of a Hindú family of proprietors defrauded by a contract between the manager and a third party has a right to have the contract altogether rescinded, 4 Bom. 29, fol-

lowing *Panama Telegraph Co. v. India Rubber etc. Co.*, 10 Ch. Ap. 515.

⁵ Contract Act, sec. 19, supra, p. 556.

⁶ See 6 Bom. 309. In England, where a contract for sale contains a condition enabling the vendor to annul the sale if objections are taken, or requisitions made which he is unable or unwilling to remove, 'the right of the vendor to enforce that condition may be affected by the fact that the contract contains a condition for compensation [for misdescription].

(b) where the contract is unlawful for causes not apparent on its face¹, and the defendant is more to blame than the plaintiff²;

(c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay³.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received⁴ by him as such possessor⁵.

In the same case, the Court may by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations

to (a).—*A* sells a field to *B*. There is a right of way over the field of which *A* has direct personal knowledge, but which he conceals from *B*. *B* is entitled to have the contract rescinded.

to (b).—*A*, an attorney, induces his client *B*, a Hindú widow, to transfer property to him for the purpose of defrauding *B*'s creditor's. Here the parties are not equally in fault, and *B* is entitled to have the instrument of transfer rescinded⁶.

In the absence of any condition as to compensation the purchaser's demand for compensation would, like any other requisition, enable the vendor to rescind under the condition for rescission. If there is a condition for compensation and an error covered by that condition is admitted or clearly proved by the purchaser, the vendor will have to give compensation and cannot rescind on the ground of unwillingness to comply with the purchaser's requisition, *Law Quarterly Review*, iii. 61.

¹ *Simpson v. Howden*, 3 Myl. & Cr. 99; *Gray v. Mathias*, 5 Ves. 286, 294. *Williams v. Bayley*, L. R., 1 H. L. 200, 216. Where the parties are equally in fault, neither can obtain relief. Where a person has been induced to enter into a contract by representations which turn out to be untrue, it is no answer to his claim for re-

scission to say that if he had used due diligence he would have discovered the untruth, *Redgrave v. Hurd*, 20 Ch. D. 1.

² In such cases there must, apparently, be a new suit for rescission. Otherwise in England, *Hutchings v. Humphreys*, 54 L. J., Ch. 650.

³ i.e. actually received, not also such as, but for his wilful default, he might have received, *Collett*, 213.

⁴ *Clark v. Wallis*, 35 Beav. 460. And where a sale of immoveable property is set aside for fraud, the purchaser is not entitled to any allowance for repairs or lasting improvements, 5 Bom. 450, 462, following *Master of Clare Hall v. Harding*, 6 Hare, 273.

⁵ *Ford v. Harrington*, 16 N. Y. 285, cited in the notes to § 1903 of the draft N. Y. Civil Code.

Rescission
for mis-
take.

36. Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

Alterna-
tive prayer
for rescis-
sion in
suit for
specific
perform-
ance.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly ¹.

Court may
require
party re-
scinding to
do equity.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require ².

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS ³.

When can-
cellation
may be
ordered.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled ⁴.

If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

¹ See *Mosely v. Virgin*, 3 Ves. 184: Fry, 457, who adds the proviso that the alternative relief is based on the same state of facts, though with different conclusions as to law.

² *Holbrook v. Sharpey*, 19 Ves. 131: *Bromley v. Holland*, 5 Ves. 618. See Act IX of 1872, secs. 64, 65.

³ Taken for the most part from the draft N.Y. Civil Code, arts. 1906, 1908.

⁴ 7 Mad. H. C. 372: 7 Cal. 736.

English cases are: *Threlfall v. Lunt*, 7 Sim. 627 (bill of exchange): *Peake v. Highfield*, 1 Russ. 559 (forged deed): *Ogilvie v. Jeaffreson*, 2 Giff. 353 (conveyance procured by fraud): *Willan v. Willan*, 16 Ves. 72 (signature obtained by surprise). As to the limitation for such suits, see Act XV of 1877, sched. II. art. 91, in vol. ii. of this work: see too L. R., 1 I. A. 192.

Illustrations.

(a) *A*, the owner of a ship, by fraudulently representing her to be seaworthy, induces *B*, an underwriter, to insure her. *B* may obtain the cancellation of the policy¹.

(b) *A* conveys land to *B*, who bequeaths it to *C* and dies. Thereupon *D* gets possession of the land and produces a forged instrument stating that the conveyance was made to *B* in trust for him. *C* may obtain the cancellation of the forged instrument².

(c) *A*, representing that the tenants on his land were all at will, sells it to *B*, and conveys it to him by an instrument dated the 1st January 1877. Soon after that day, *A* fraudulently grants to *C* a lease of part of the lands dated the 1st October 1876, and procures the lease to be registered under the Indian Registration Act. *B* may obtain the cancellation of this lease³.

(d) *A* agrees to sell and deliver a ship to *B*, to be paid for by *B*'s acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by *A* on *B*. The bills are drawn and accepted, but the ship is not delivered according to the agreement. *A* sues *B* on one of the bills. *B* may obtain the cancellation of all the bills⁴.

40. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

What instruments may be partially cancelled.

Illustration.

A draws a bill on *B*, who endorses it to *C*, by whom it appears to be endorsed to *D*, who endorses it to *E*. *C*'s endorsement is forged. *C* is entitled to have such endorsement cancelled, leaving the bill to stand in other respects⁵.

41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require⁶.

Power to require party for whom instrument is cancelled to make compensation.

¹ *Thornton v. Knight*, 16 Sim. 510, per Sir L. Shadwell.

² *Masters v. Braban*, cited 1 Russ. 560, 561.

³ *Pierce v. Webb*, 3 Brown, C. C. 16, note.

⁴ *Anglo-Danubian Co. v. Rogerson*, L. R., 4 Eq. 3.

⁵ So where *A* contracted to cultivate indigo for *B*, for a certain number of years, on certain lands, of some of which *A* was only sub-tenant. During the continuance of the contract, *A*'s immediate landlord was ejected, and *A* consequently lost possession of the lands of which he was sub-tenant. *A*

was held entitled to have so much of the contract as related to those lands cancelled, leaving it to stand in other respects, 7 Cal. 474.

⁶ 7 Ben. 630, 642, where the plaintiff sued to set aside a bill of sale on account of duress which did not destroy his free agency. 'Compensation' here includes repayment. Where *A* by coercion by *B* is induced to execute a deed of sale, and *A* receives the consideration-money, he can only have the deed set aside upon terms of accounting for the money and interest thereon, 14 Moore, I. A. 53.

CHAPTER VI.

OF DECLARATORY DECREES.

Discretion
of Court
as to de-
clarations
of status
or right.

42. Any person entitled ¹ to any legal character, or to any right as to any property, may institute a suit ² against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion ³ make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief ⁴.

Bar to
such de-
claration.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so ⁵.

Explanation.—A trustee of property is a ‘person interested to deny’ a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustrations.

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land.

¹ The section refers only to existing and vested rights, not to contingent rights, 8 Cal. 15. A presumptive heir therefore cannot sue for a declaration of his right. And, furthermore, there must be some present danger or detriment to such right (2 Story, Eq. Jur. 1511). And lastly, under the proviso, he who is entitled (if at all) to an executory decree cannot seek only a declaratory decree, Collett, 224.

² A suit by a Muhammadan to have certain property declared to be *waqf* for the general body of Muhammadans does not lie under this section, 8 All. 31, 70. Nor a suit to obtain a declaration that in a certain village a custom prevails which enables the landlord to take land from an occupancy-tenant against his will for the purpose of cultivating indigo, 7 All. 880. Nor a suit for a declaration that a certain decree was, so far as it affected the plaintiff, collusive and void, 7 All. 884.

³ This discretion should be exercised

with great caution, 8 Cal. 765, per Wilson J. It will not be exercised where doing so would countenance an evasion of the law relating to court-fees (Act VII of 1870), 3 Bom. 230. And it will not of course be exercised where the Court in making the declaration sought would be recognising an immoral custom, such as a number of dancing-girls associating to enjoy a monopoly of the gains of prostitution, 1 Mad. 168.

⁴ L. R., 9 I. A. 41: 5 Cal. 949: 10 Cal. 1078. But on the corresponding section of Act VIII of 1859 the Judicial Committee held that the Court must see that the declaration of right may be the foundation of relief to be got somewhere, 19 Suth. W. R. 174.

⁵ 5 All. 55: 9 Bom. 357. The object of the proviso is to avoid multiplicity of actions and to prevent a man getting a declaration of right in one suit and immediately after a remedy in another. As to the law in force before 1st May, 1877, see L. R., 10 I. A. 150.

A may sue for a declaration that they are not entitled to the right so claimed¹.

(b) *A* bequeaths his property to *B*, *C* and *D*, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.'² No such children are in existence. In a suit against *A*'s executor, the Court may declare whether *B*, *C* and *D* took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested³.

(c) *A* covenants that if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration⁴.

(d) *A* alienates to *B* property in which *A* has merely a life-interest. The alienation is invalid as against *C*, who is entitled as reversioner. The Court may in a suit by *C* against *A* and *B* declare that *C* is so entitled⁵.

(e) The widow of a sonless Hindú alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her⁶, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime⁶.

(f) A Hindú widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid⁷.

(g) *A* is in possession of certain property. *B*, alleging that he is the owner of the property, requires *A* to deliver it to him. *A* may obtain a declaration of his right to hold the property⁸.

(h) *A* bequeaths property to *B* for his life, with remainder to *B*'s wife and her children, if any, by *B*, but if *B* die without any wife or children, to *C*. *B* has a putative wife, *D*, and children,

¹ Here the exercise of the right of way was a present detriment to *A*'s right.

² *Fletcher v. Rogers*, 10 Hare, App. xiii.

³ *Fyfe v. Arbuthnot*, De G. & J. 406.

⁴ Here again there is a present injury to *C*'s indefeasible right as reversioner.

⁵ His interest is vested, not contingent.

⁶ 7 Bom. 291; 10 Cal. 324; and see L. R., 9 Ind. App. 41.

⁷ 7 Mad. H. C. 351.

⁸ So if *A* is in possession of a certain office, and *B* requires him to surrender it, *A* may sue for a declaration of his right to continue in it, unless he has actually been ejected from the performance of its duties, or the enjoyment of its emoluments, 8 Mad. 364, per Turner C.J. Where *A* sues *B* for specific performance of a contract to sell certain land he cannot in the same suit ask for a declaration that *C* is not entitled to any charge on such land, 5 Bom. 177, and Code of Civil Procedure, sec. 45.

but *C* denies that *B* and *D* were ever lawfully married. *D* and her children may, in *B*'s lifetime, institute a suit against *C* and obtain therein a declaration that they are truly the wife and children of *B*¹.

Effect of
declaration.

43. A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees².

Illustration.

A, a Hindú, in a suit to which *B*, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order³. *C*, claiming that *B* is his wife, then sues *A* for the recovery of *B*. The declaration made in the former suit is not binding upon *C*.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appoint-
ment dis-
cretionary.
Reference
to Civil
Procedure
Code.

44. The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure⁴.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

Power to
order
public ser-
vants and
others to
do certain
specific
acts.

45. Any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a

¹ Here the present danger is that the evidence of the status of *D* and her children may be lost. For the English law on the subject see 21 & 22 Vic. c. 93: 22 & 23 Vic. c. 61, sec. 7: 44 & 45 Vic. c. 68, sec. 9.

² This section might now be repealed; see the Code of Civil Procedure, sec. 13, on *res judicata*.

³ 23 Suth. Civ. R. 179, and see 14 Ben. 298.

⁴ Secs. 503-505.

temporary nature, or by any corporation or inferior Court of Judicature:

provided—

(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

(b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

(d) that the applicant has no other specific and adequate legal remedy¹; and

(e) that the remedy given by the order applied for will be complete².

Nothing in this section shall be deemed to authorise any High Court—

(f) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal;

(g) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown; or

(h) to make any order which is otherwise expressly excluded by any law for the time being in force.

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the

Exemptions from such power.

Application how made.

¹ In England the legal remedy, the existence of which bars the applicant, is an action at law. It is no objection that the party against whom the complaint is made may be indicted, *R. v. Severn & Wye Ry. Co.*, 2 B. & Ald. 646.

² These provisions, which express the results of an experience of centuries gained by superior courts in England, working without statutory limits to their jurisdiction, show very

clearly the proper limits of peremptory interference, even when there has been an excess of jurisdiction, or a failure to exercise it, by the Lower Court, 7 Bom. 370.

The existence of an easier remedy under this chapter does not apparently bar a suit for specific performance. Otherwise in England, *Leominster Canal Co. v. Shrewsbury &c. Ry. Co.*, 3 K. & J. 654.

Procedure thereon. matter in question, his demand of justice and the denial thereof; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Order in alternative. If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

Peremptory order. 47. If the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Execution of, and appeal from, orders. 48. Every order under this chapter shall be executed, and may be appealed from¹, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

Costs. 49. The costs of all applications and orders under this chapter shall be in the discretion of the High Court.

Bar to issue of mandamus. 50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*².

Power to frame rules. 51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this chapter; and until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this chapter³.

¹ whether after cause shown or not. In 1872 the High Court ruled that no appeal lay from an order that a *mandamus* do issue. See 8 Ben. 433 (*Justices of Peace for Calcutta v. Oriental Gas Co.*).

² As to *mandamus* to enforce the rights of directors of companies, 9 Bom. H. C. 438: to compel a Small Cause Court to hear a *wakil* of the High Court, 7 Suth. Civ. R. 228, 230.

³ In 1876 the Standing Counsel

wrote: 'This practice seems to be wholly at large at present. In fact, one can hardly say that there is any ascertained practice in *mandamus* (see 8 Ben. 433).' In 8 Ben. 454, Couch C.J. thought it was intended by the rule of 4th April, 1866, to make the ordinary civil procedure (so far as might be) applicable to the proceeding by way of *mandamus* in the High Court at Fort William.

PART III.

OF PREVENTIVE RELIEF.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. Preventive relief how granted.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure. Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff¹. Perpetual injunctions.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

54. Subject to the other provisions contained in, or referred to by, this chapter², a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. Perpetual injunctions when granted.

When such obligation arises from contract, the Court shall

¹ 7 Mad. H. C. 71.

² Also subject to the discretion of the Court, sec. 52. As to whether the Court will give relief by injunc-

tion or by damages, see 8 Bom. 70, where the Court dealt with the case by combining damages and injunction.

be guided by the rules and provisions contained in Chapter II of this Act ¹.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, (namely):—

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion ²;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief ³;

(d) where it is probable that pecuniary compensation cannot be got for the invasion;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation.—For the purpose of this section a trademark is property.

Illustrations.

(a) *A* lets certain land to *B*, and *B* contracts not to dig sand or gravel thereout. *A* may sue for an injunction to restrain *B* from digging in violation of his contract ⁴.

(b) *A* trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(c) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them ⁵.

(d) The directors of a fire and life-insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them ⁶.

(e) *A*, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f) *A*, a trustee for *B*, is about to make an imprudent sale of a small part of the trust-property. *B* may sue for an injunction to

¹ For most of such cases an injunction is in effect a specific performance, Collett, 277.

² *Jackson v. Duke of Newcastle*, 3 De G. J. & S. 275.

³ 8 Bom. H. C. 181; 2 Bom. 133.

⁴ *City of London v. Pugh*, 4 Bro. P. C. 395.

⁵ *McDougall v. Jersey Hotel Co.*,

2 H. & M. 528.

⁶ *Natusch v. Irving*, 2 Coop. C. C. 358.

restrain the sale, even though compensation in money would have afforded him adequate relief¹.

(g) *A* makes a settlement (not founded on marriage or other valuable consideration) of an estate on *B* and his children. *A* then contracts to sell the estate to *C*. *B* or any of his children may sue for an injunction to restrain the sale².

(h) In the course of *A*'s employment as a vakil, certain papers belonging to his client, *B*, come into his possession. *A* threatens to make these papers public, or to communicate their contents to a stranger. *B* may sue for an injunction to restrain *A* from so doing.

(i) *A* is *B*'s medical adviser. He demands money of *B* which *B* declines to pay. *A* then threatens to make known the effect of *B*'s communications to him as a patient. This is contrary to *A*'s duty, and *B* may sue for an injunction to restrain him from so doing³.

(j) *A*, the owner of two adjoining houses, lets one to *B* and afterwards lets the other to *C*. *A* and *C* begin to make such alterations in the house let to *C* as will prevent the comfortable enjoyment of the house let to *B*. *B* may sue for an injunction to restrain them from so doing⁴.

(k) *A* lets certain arable lands to *B* for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, *B* threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. *A* may sue for an injunction to restrain *B* from sowing the lands in contravention of his implied contract to use them in a husbandlike manner⁵.

(l) *A*, *B* and *C* are partners, the partnership being determinable at will. *A* threatens to do an act tending to the destruction of the partnership-property. *B* and *C* may, without seeking a dissolution of the partnership, sue for an injunction to restrain *A* from doing the act⁶.

(m) *A*, a Hindú widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(n) *A*, *B* and *C* are members of an undivided Hindú family. *A* cuts timber growing on the family-property, and threatens to destroy part of the family-house and to sell some of the family-utensils. *B* and *C* may sue for an injunction to restrain him⁷.

¹ *Anon.* 6 Maddock, 10. That an injunction will be granted to prevent a breach of trust even where damages would have been sufficient, see *Atty. Gen. v. Aspinall*, 2 My. & Cr. 613; *Wood v. Rowcliffe*, 2 Phill. 382, 383; 3 Hare, 304.

² Compare sec. 24, cl. (d), and sec. 25, cl. (e) and ill. (d).

³ See sec. 55, ill. (o).

⁴ *Palmer v. Paul*, 2 L. J., Ch. 154 (1824).

⁵ *Pratt v. Brett*, 2 Maddock, 62.

⁶ *Miles v. Thomas*, 9 Sim. 609. And if *A* give notice to dissolve, this will not affect the injunction.

⁷ See *Job v. Potton*, L. R., 20 Eq. 84.

(o) *A*, the owner of certain houses in Calcutta, becomes insolvent. *B* buys them from the official assignee and enters into possession. *A* persists in trespassing on and damaging the houses, and *B* is thereby compelled, at considerable expense, to employ men to protect the possession. *B* may sue for an injunction to restrain further acts of trespass¹.

(p) The inhabitants of a village claim a right of way over *A*'s land. In a suit against several of them, *A* obtains a declaratory decree that his land is subject to no such right². Afterwards each of the other villagers sues *A* for obstructing his alleged right of way over the land. *A* may sue for an injunction to restrain them³.

(q) *A*, in an administration-suit to which a creditor, *B*, is not a party, obtains a decree for the administration of *C*'s assets. *B* proceeds against *C*'s estate for his debt. *A* may sue for an injunction to restrain *B*⁴.

(r) *A* and *B* are in possession of contiguous lands and of the mines underneath them. *A* works his mine so as to extend under *B*'s mine and threatens to remove certain pillars which help to support *B*'s mine. *B* may sue for an injunction to restrain him from so doing⁵.

(s) *A* rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, *B*. *B* may sue for an injunction restraining *A* from making the noise⁶.

(t) *A* pollutes the air with smoke⁷ so as to interfere materially with the physical comfort of *B* and *C*, who carry on business in a neighbouring house. *B* and *C* may sue for an injunction to restrain the pollution⁸.

(u) *A* infringes *B*'s patent. If the Court is satisfied that the patent is valid and has been infringed⁹, *B* may obtain an injunction to restrain the infringement.

(v) *A* pirates *B*'s copyright. *B* may obtain an injunction to

¹ *Hodgson v. Duce*, 2 Jur., N. S. 1014 (where the defendant was a pauper); see *Best v. Drake*, 11 Hare, 369.

² The illustration assumes that the suit has been so brought, as, under sec. 43, to be binding upon all the inhabitants of the village as a body, Collett, 312-3.

³ *Weale v. W. Middlesex Waterworks Co.*, 1 Jac. & W. 358, 369.

⁴ 2 Dan. Ch. Pr., 5th ed., 1463. But now see *ibid.*, 6th ed., 1944. This and illustration (p) show that multiplicity of suits may be restrained; see also sec. 56, cl. (a).

⁵ *Lord Lonsdale v. Curwen*, 3 Bligh, H. L. Ca. 168.

⁶ *Saltau v. De Held*, 2 Sim. N. S. 133.

⁷ Dust and cotton fluff are analogous to smoke in the character of the annoyance which they cause, and are subject to much the same considerations, 8 Bom. 55. So are all noxious or offensive odours and gases.

⁸ *Sampson v. Smith*, 8 Sim. 272.

⁹ and belongs to *B*. Where possession of a patent is supported by quiet and exclusive enjoyment of some duration, or where the title has been successfully asserted in litigation, with the result of which the Court has no reason to be dissatisfied, credit will be given to the title unless its invalidity, if it be invalid, is established; see *Kerr on Injunctions*, 2nd ed., 272-3.

restrain the piracy, unless the work of which copyright is claimed is libellous or obscene¹.

(w) *A* improperly uses the trademark² of *B*. *B* may obtain an injunction to restrain the user, provided that *B*'s use of the trademark is honest³.

(x) *A*, a tradesman, holds out *B* as his partner against the wish and without the authority of *B*. *B* may sue for an injunction to restrain *A* from so doing⁴.

(y) *A*, a very eminent man, writes letters on family-topics to *B*. After the death of *A* and *B*, *C*, who is *B*'s residuary legatee, proposes to make money by publishing *A*'s letters. *D*, who is *A*'s executor, has a property in the letters, and may sue for an injunction to restrain *C* from publishing them⁵.

(z) *A* carries on a manufactory and *B* is his assistant. In the course of his business, *A* imparts to *B* a secret process of value. *B* afterwards demands money of *A*, threatening, in case of refusal, to disclose the process to *C*, a rival-manufacturer. *A* may sue for an injunction to restrain *B* from disclosing the process⁶.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts⁷.

Mandatory
injunc-
tions.

Illustrations.

(a) *A*, by new buildings, obstructs lights to the access and use of which *B* has acquired a right under the Indian Limitation Act, Part IV. *B* may obtain an injunction, not only to restrain *A* from going on with the buildings, but also to pull down so much of them as obstructs *B*'s lights⁸.

(b) *A* builds a house with eaves projecting over *B*'s land. *B* may sue for an injunction to pull down so much of the eaves as so project.

¹ or seditious? *Walcot v. Walker*, 7 Ves. 1: *Southey v. Sherwood*, 2 Mer. 435. See sec. 55, ill. (g).

² See the Penal Code, sec. 478, supra, p. 275.

³ i.e. the trademark must not contain misstatements of any material fact calculated to deceive the public, *Kerr on Injunctions*, 2nd ed., p. 368: 3 Ben. App. 4: 3 Cal. 417.

⁴ *Routh v. Webster*, 10 Beav. 561: *Dixon v. Holden*, L. R., 7 Eq. 488.

⁵ See sec. 55, ill. (d).

⁶ *Daniell*, 1592. As to the principles on which the Court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers, 8 Bom. H. C., O. C. J. 85.

⁷ 8 Bom. H. C. 181. This is called a mandatory injunction. See sec. 55, ill. (g). That such an injunction may be granted where the injury sought to be restrained has been completed before the institution of the suit, see *Durell v. Prichard*, L. R., 1 Ch. App. 250.

⁸ *Jessel v. Chaplin*, 2 Jur., N. S. 931: *Smith v. Smith*, 23 W. R. 771: 7 Cal. 453. In executing such decrees the Court should employ a professional man agreed upon by the parties, if they can agree, but if not, then one nominated by itself, to determine what demolition is necessary to give effect to the decree in the way least injurious to the defendant, 2 Bom. 139.

(c) In the case put as illustration (f) to section 54, the Court may also order all written communications made by *B*, as patient, to *A*, as medical adviser, to be destroyed.

(d) In the case put as illustration (g) to section 54, the Court may also order *A*'s letters to be destroyed.

(e) *A* threatens to publish statements concerning *B* which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to *B*'s property¹.

(f) *A*, being *B*'s medical adviser, threatens to publish *B*'s written communications with him, showing that *B* has led an immoral life. *B* may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (v) and (w) to section 54, and as illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trademarks, statements and communications, therein respectively mentioned, to be given up or destroyed.

Injunction
when
refused.

56. An injunction cannot be granted—

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought²;

(c) to restrain persons from applying to any legislative body³;

(d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government⁴;

(e) to stay proceedings in any criminal matter⁵;

(f) to prevent the breach of a contract the performance of which would not be specifically enforced⁶;

¹ This illustration is at variance with the English decisions that there can be no injunction to restrain the publication of a libel, which were followed in 1 Bom. 132 (1876).

² 5 All. 429, 430; 4 Cal. 396.

³ whether in India or in a foreign country. But see in England, *Steele v. N. Metr. Ry. Co.*, L. R., 2 Ch. App. 237; *Hawkes v. E. C. Ry. Co.*, 1 D. M. & G. 737.

⁴ *Hawley v. Steele*, 6 Ch. D. 528; *Gladstone v. Ottoman Bank*, 1 H. & M. 505. (Otherwise where the department is a mere conduit-pipe,

Ellis v. Earl Grey, 6 Sim. 214.) And where a public body, such as a Municipal Commission, has received from the legislature a discretion to determine on the levy of a rate and an obligation to collect it, the Court cannot deprive that body of such discretion or prohibit it from discharging its obligation, 3 Mad. 211.

⁵ *Kerr v. Corporation of Preston*, 6 Ch. D. 466. But see *Daniell*, 1578.

⁶ 5 All. 429. See sec. 54, *supra*, and the English cases, *Newbery v. James*, 2 Meriv. 446; *Williams v. Williams*, 3 Id. 160.

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance¹;

(h) to prevent a continuing breach in which the applicant has acquiesced²;

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding³, except in case of breach of trust⁴;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court⁵;

(k) where the applicant has no personal interest in the matter⁶.

Illustrations.

(a) *A* seeks an injunction to restrain his partner, *B*, from receiving the partnership-debts and effects. It appears that *A* had improperly possessed himself of the books of the firm and refused *B* access to them. The Court will refuse the injunction⁷.

(b) *A* manufactures and sells crucibles, designating them as 'patent plumbago crucibles,' though, in fact, they have never been patented. *B* pirates the designation. *A* cannot obtain an injunction to restrain the piracy⁸.

(c) *A* sells an article called 'Mexican Balm,' stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. *B* commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying *A*'s Mexican Balm. *A* sues *B* for an injunction to restrain the sale. *B* shows that *A*'s Mexican Balm consists of nothing but scented hog's lard. *A*'s use of his description is not an honest one and he cannot obtain an injunction⁹.

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain Injunction to perform negative agreement.

¹ *Haines v. Taylor*, 10 Beav. 75.

² 10 Bom. H. C. 97. See *Duke of Leeds v. Earl Amherst*, 2 Ph. 123.

³ 9 Cal. 611. Thus it has been held in America that an injunction will not be granted where full relief can be obtained by means of a writ of prohibition or of certiorari, or by filing a notice of action pending.

⁴ *Supra*, sec. 54, ill. (f).

⁵ If, e.g. an applicant landlord stands by for a considerable time during which he allows the tenant against whom he applies to go on with his work and lay out his money and labour upon the land, without any objection, 9 Cal. 611. As to circumstances constituting delay and

acquiescence, see 2 Bom. 133, and the judgment of the P. C. in *Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C. 239.

⁶ *Forrest v. Manchester &c. Ry. Co.*, 7 Jur., N. S. 887.

⁷ *Littlewood v. Caldwell*, 11 Price, 97; *Morgan v. McAdam*, 36 L. J., Ch. 228.

⁸ *Perry v. Truett*, 6 Beav. 66. As to premature applications for injunctions, see 5 All. 369, where the Court dismissed a suit for the removal of two young mango trees, which the plaintiff alleged would, when they grew up, overshadow his field and injure his crops.

act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him¹.

Illustrations.

(a) *A* contracts to sell to *B* for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. *B* pays *A* the Rs. 1000, but *A* carries on the business in Calcutta. The Court cannot compel *A* to send his customers to *B*, but *B* may obtain an injunction restraining *A* from carrying on the business in Calcutta.

(b) *A* contracts to sell to *B* the good-will of a business. *A* then sets up a similar business close by *B*'s shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and *B* may obtain an injunction to restrain *A* from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from *B*².

(c) *A* contracts with *B* to sing for twelve months at *B*'s theatre and not to sing in public elsewhere. *B* cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining *A* from singing at any other place of public entertainment³.

(d) *B* contracts with *A* that he will serve him faithfully for twelve months as a clerk. *A* is not entitled to a decree for specific performance of this contract⁴. But he is entitled to an injunction restraining *B* from serving a rival house as clerk⁵.

(e) *A* contracts with *B* that, in consideration of Rs. 1000 to be paid to him by *B* on a day fixed, he will not set up a certain business within a specified distance. *B* fails to pay the money. *A* cannot be restrained from carrying on the business within the specified distance⁶.

¹ 6 Bomb. 280, citing *Doherty v. Allman*, L. R., 3 App. Ca. 709.

² But see in England, *Crutwell v. Lye*, 17 Ves. 335.

³ *Lumley v. Wagner*, 1 D. M. & G. 604.

⁴ *Supra*, pp. 958, 960.

⁵ Here the negative agreement is implied.

⁶ For here the applicant, *B*, has failed to perform the contract so far as it is binding on him.

SCHEDULE.

See section 2.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
VIII of 1859 .	Civil Procedure	Sections 15 and 192.
XIV of 1859 .	Limitation	Section 15.
XXIII of 1861 .	Civil Procedure	Section 26 ¹ .
IX of 1872 . .	Contract	In Section 28, the second clause of exception 1.

¹ Re-enacted by the last clause of sec. 9, *supra*.

INDEX.

- Abandonment of children, p. 215.
 Abatement, of annuity bequeathed, 425;
 of general legacies, 466; of specific,
 467; of demonstrative, 411, note 2;
 of obstruction of easement, 885, 916;
 of price as compensation to buyer, 954.
 Abduction, 230, 231. *See* Forced
 labour, Kidnapping, Slave.
 Abetment, 65, 66, 67, 127-135, and *see*
 Arrangement of sections, p. 77; of
 waging war, 136, 138; of mutiny,
 140; of assaults by soldiers and
 sailors, 140; of desertion, 141; of in-
 subordination, 141; of counterfeiting
 coin out of British India, 186; of
 suicide, 211, 212. *See* Concealment,
 Public servant, Suicide.
 Abortion, 44, 213, 214. *See* Mis-
 carriage.
 Absconding to avoid service of sum-
 mons, 155 and note 2.
 Abu and Anadra, 3.
 Acceleration of death, 205.
 Acceptance, of proposal, 493, 548, 550;
 of performance from third person,
 572; of satisfaction, 582; of goods on
 breach of warranty, 609; of gift, 810,
 811; of bill, 684; delivery to com-
 plete, 689; to pay at specified place,
 696; cancellation of, 700; qualified,
 701; after alteration, 702; presump-
 tion as to time of, 713; presentment
 for, 694; by drawee in case of need,
 711; of bill in set, 717; of trust, 841.
See Drawee, Election, Gift, Holder,
 Revocation, Sale.
 Acceptance for honour, 710, 711.
 'Acceptor,' defined, 677; liability of,
 683-685; where indorsement is
 forged, 686; where drawer fictitious,
 686, 687; holding bill at maturity,
 702; estoppels binding, 714.
 'Acceptor for honour,' defined, 677;
 his liability, 710; presentment to
 charge, 711; estoppel binding, 714.
 Accession to mortgaged property, 778,
 784; to property leased, 802.
 Accessories, 64, 66. *See* Abetment.
 Accessory contracts, 509; rights, 910;
 extinction of, 887, 922; licences, 924.
 Accident, 12, 117; causing death by,
 39, 207.
 Accommodation bill, 685, note 1, 687,
 note 1; when overdue or dishonoured,
 693; when presentment for payment
 unnecessary, 697; when notice of
 dishonour unnecessary, 704.
 Accomplices, 64, 65.
 Accord and satisfaction, 506.
 Account stated, 509, 532.
 Accounts of deceased's estate, 463; of
 agent, 638; to be rendered by part-
 ners, 652, 654; of mortgagee in pos-
 session, 787, 788; of trustee, 846.
 Accretion. *See* Alluvion.
 Accumulation of income, 307, 312, 389,
 727, 752, 753.
 Accusation in good faith, 288.
 Achandrārkam, 312.
 Achārita, 53.
 Acknowledgment of testator's signa-
 ture, 358 and note 8.
 Acquiescence in continuance of broken
 contract, 571; ratification implied
 by, 633; in continuing breach of obli-
 gation, 989; circumstances constitut-
 ing, 989, note 5.
 Acquisition of easements, 900-907.
 'Act,' includes omission, 100; effect
 caused partly by act and partly by
 omission, 100; done by several in fur-
 therance of common intention, 100;
 several persons committing criminal
 act, 101.
 Act of God, 503, note 1, 579. *See* Vis
 major.
 Act of honour, 707.
 Actionable claims, 738; incidents of,
 750; transfers of, 813-875. *See* Debt.
 Actionable wrongs, xix, 72; fraudulent
 representation of agency, 495. *See*
 Assault, Bailee, Bailor.
 Active concealment, 555.
 Ademption, 306, 406, 413-418.
 Administration, with copy of copy an-
 nexed, 433; necessity of, 435; to

- whom it cannot be granted, 435; rights under letters of, 435; acts not validated by, 436; where executor has not renounced, 436; with copy of will annexed, 436; to legatee, 436, 437; to creditor, 437, 438; to widow, 437, 438; to husband, 438; to mother, 438; to kindred, 438; in case of person domiciled abroad, 438; until will is produced, 439; to attorney, 440; during minority, 440; until one of several minors attains majority, 440, 441; for use and benefit of lunatic *jus habens*, 441; pendente lite, 441; limited, 442, 443; subject to exception, 443, 444; when limited grant has expired, 444; practice in granting, 447-457. *See* Alteration, Revocation.
- Administration-bond, 455; assignment of, 456.
- Administration-suit, 794.
- Administrator, 339, 443; rights of, 433, 457; acts of, 436; powers of, 460, 462; duties of, 463-467; of effects unadministered, 462; specific performance enforced against, 971. *See* Administration, Representatives.
- Administrator-General, 7, 153, note 3, 304, 305, 869.
- Admiralty jurisdiction, 5.
- Adopted son, 489.
- Adoption, non-enforcement of mere agreement to adopt, 958, note 7; declaration of invalidity of, 979. *See* Authority to adopt, Forgery.
- Adoptive father, 485, 489.
- Adulterating food, drink, or drugs, 195, 196.
- Adultery, 35, 36, 283; excludes widow from administration, 437; with partner's wife, 653, note. *See* Marriage.
- Advancement of children, 300; not brought into hotchpot, 353; provision for, 761, 856, 857.
- Advantage, secretly gained by compounding creditor, 877; unfair, 962.
- Advantages arising from situation, 896, 897.
- Advertisement of dissolution of partnership, 655, note 2.
- Advice of Court, trustee's right to apply for, 854.
- Advocacy, contract concerning, 560, note.
- Affidavit, 489; by applicant for order to enforce public duty, 981, 982.
- Affirmation, 452; included in 'oath,' 103, 489; refusing to make, 158.
- Affirmative easements, 881.
- Affray, 148; assaulting public servant when suppressing, 146; disobedience tending to cause, 162. *See* Riot, Unlawful assembly.
- 'After sight,' 680; presentment for acceptance of bill payable, 694; presentment for payment of note payable, 695.
- Agency, contract of, 519, 520, 629-646; termination of, 633, 634.
- Agent, 629; of owner of land on which riot etc. takes place, 146, 147; criminal breach of trust by, 249; contracts by, 495, 642; damages for wrongful discharge of, 589, note 1; who may employ, 629; who may be, 629; his authority, 629, 630; compensation to, 635, 641; his right to retain moneys received, 639; when his remuneration becomes due, 639; indemnification of, 640-641; lien of, 640; his duty to principal, 636, 637; skill and diligence required from, 637; exceeding authority, 642; notice to, 643; when bound by contract on behalf of principal, 643; liability of pretended, 645; misrepresentation or fraud by, 646; when remunerated by share of profits of trade, 648; his power to make etc. notes, bills, and cheques, 682; his liability thereon, 682, 683; presentment to, 696; service on, 798; misconduct of, a defence to suit for specific performance, 971-972, or for an injunction, 989. *See* Breach of trust, Partners, Principal, Riot, Sub-agent, Unlawful assembly.
- Aggravated forms of trespass, 61.
- Agreement, 492, 547; discharge of contract by, 501, 502; of which object or consideration unlawful, 559, 560; when a contract, 552; without consideration, 562; in writing registered, 562; to compensate for something done, 562; to pay time-barred debt, 562; in restraint of marriage, 563; in restraint of trade, 563, 564; in restraint of legal proceedings, 564; to refer to arbitration, 565. *See* Alteration, Consideration, Void agreement, Waiver.
- Agricultural purposes, buildings for, 804; leases for, 808.
- Aid. *See* Abetment.
- Aiding, 127; aiding escape of prisoners of state or war, 139. *See* Abetment.
- Air, right to, 885, 897; right to purity of, 897; extent of right to passage of, 912; injunction to restrain pollution of, 986.
- Ajmer and Merwara, local laws in, 10.

- Aleatory gain**, 509, 523.
Alien enemies, 492.
Alienation, 509; condition restraining, 750; making interest terminable on attempted, 751. *See* Assignment, Gift, Exchange, Sale, Transfer.
Aliens, 492, 862.
Allonge, 679, note 2; to Government securities, *see* Addenda.
Alluvion, 735, 802, 884, 887; increase of easement by, 913. *See* Accession.
Ally of the Queen, 138.
Alteration, of document in material part, 269; of will, 357, 362, 364; in grants of probate or letters of administration, 445; of terms, discharge by, 502; discharge of contract by, 508; in material parts, 570, note 2; of partnership contract, 650; of negotiable instrument, 701 and notes 3 and 4, 702; of servient heritage, 919. *See* Acceptance, Coin, Forgery.
Alternative, bequest in the, 375.
Alternative prayer for rescission in suit for specific performance, 976.
Alternative promise of which one branch is illegal, 580.
Alyasantāna, 283, note 8.
Amalgamation of companies, 970.
Ambassadors, 4 and note 2; domicile of, 342.
Ambiguous clauses, 371; instrument, 679.
Amenity, 894, 895.
Americans punishable with transportation instead of penal servitude, 20, 108.
Amount stated differently in figures and in words, 679.
Ancestral land, contract to sell, 959, note 3.
Ancestral trade, 652, note 4.
Ancillary contracts, 525-533.
Andaman and Nicobar Islands, local laws in, 10.
Animal, definition of, 11, 103; negligence with respect to, 199; killing or maiming, 257, 258; trust for, 838, note 1. *See* Mischief.
Animus domini, 56, note 1.
Annoyance by drunken person, 292. *See* Insult, Intimidation.
Annuity, bequest of, 424, 425; payment and apportionment, 471; agreement to pay life, 523, 524; out of profits of partnership, 648; specific performance of contract to grant, 953-4; contract to pay for life of A and B, A being dead, 962. *See* Abatement, Interest, Investment.
Annulment of grants of probate or administration, 445; of contract of partnership, 650; of sale, condition for, 974, note 6.
Anomalous mortgages, 797.
Anonymous communications, 291.
Apparent easements, 895.
Appeal, from orders of district judge under Succession Act, Part xxxi, 457; from order relating to discharge of encumbrances on sale, 773; none from order in summary suit by person dispossessed of immoveable property, 949.
Application, for probate or letters of administration, 448-450; for performance of promise, 575; for delivery of goods, 601; for order enforcing public duty, 980, 981. *See* Appropriation.
Appointment, power of, 362, 372, 373; of executor, 433; of new trustees, 868, 869; of receiver, 936, 980.
Apportionment, of annuities, 471; of premia paid on entering partnership for fixed term, 522; of compensation between bailor and bailee, 628; of benefit of obligation, 727, 760; of periodical payments on transfer, 727, 760; of consideration, 764; of premium or rent, 805; of profits of intermixed trust-funds, 865, note 5.
Appraisers and bailiffs of Presidency Small Cause Courts, 96, note 3.
Apprehension, offences relating to, 161-162, 177, 179, 180, 181.
Apprenticeship contracts, 519, 552, note 1.
Appropriation, ascertainment of goods by subsequent, 596, 597; of payments, 581; of money received by receiver, 820.
Aquae ductus, 908, note 2, 909, note 4.
Arbitration, submission to, 296; reference to, 552, note 1; contract to refer to, 565, 959 and note 7; trustee's power to submit to, 857.
Arbitrator, when a 'public servant,' 96; false evidence before, 165.
Armenians, xxi; law relating to, 295 and note 3.
Arms Act, 7.
Army, offences relating to, 28, 140-142, and *see* Arrangement of sections, 78, and False reports.
Arrangement, of Codes, xxiii; of Penal Code, 1; importance of methodical, 72.
Arrears, of annuity, 477; of rent, 805.
Arrest. *See* Apprehension, Escape.
'Articles of domestic use', 370, note 2.
Articles of war, 141; Native, 7.

- Artificers' contracts, 7, 63.
 Artificial water-courses, 897, note 8.
 Artisans, wages of, 464. *See* Artificers.
 'As of right, 904, note 9.
 Ascertainment, of price, 596; of goods contracted to be sold, 596, 597.
 Asiatic power, waging war against, 138.
 Assam, local laws in, 10.
 Assault, 46, 226, 227, 228; by soldier or sailor on superior officer, abetting, 140; on Governor-General, etc., 137; on public servant when suppressing riot, 146; when executing his duty, 227; on woman to outrage modesty, 227; on person with intent to dishonour, 228; in attempting theft or wrongful confinement, 358; non-survival of right to sue for, 460. *See* Private defence, Punishment.
 Assembly, 143, 145; for purpose of dacoity, 245. *See* Unlawful assembly.
 Assent, 493; to a legacy, 462, 468-470.
 Assessment of compensation, 957 and note 3.
 Assessor, a 'public servant,' 96; personating an, 183. *See* Court of survey.
 Assets, commission on, 305; distribution of, 478, 479; extent of representative's liability depends on, 570, note 3; of partnership, 655; injunction to restrain untrustworthy executor from getting in, 984.
 Assignee of insolvent, 697; specific performance enforced against, 970, note 2.
 Assignment, of administration-bond, 456; of contractual rights and liabilities, 498, 511; by operation of law, 499; of bill of lading defeats right to stop in transit, 603. *See* Covenants, Negotiation, Reversioner, Transfer.
 Assize of novel disseisin, 929.
 Associate with widow in administration, 438.
 Association included in 'person,' 94, 338, 487.
 'At night, 680.
 Atmosphere, making obnoxious to health, 197. *See* Air.
 'Attached to the earth,' 747, 750, 802.
 Attachment of mortgaged property, 797.
 Attempt, 1, 43, 67-70, 119, 293; to wage war, 136, 138; to restrain exercise of lawful power, 137; to rescue certain prisoners or prevent recapture, 139; to seduce soldiers or sailors, 140; to commit murder, 212, 215; to commit culpable homicide, 213; to commit suicide, 213; to commit robbery, 243; to commit offences punishable with transportation or imprisonment, 293.
 Attestation of wills, 358, 359, note 2, 362; of alterations in wills, 364; of mortgages, 775; of gifts, 810.
 Attorney, criminal breach of trust by, 249; costs of, 516; liens of, 546, note 1, 626 and note 4; power of, 520.
 Attorney of absent person, grant of administration to, 440.
 Auction, 493, note 2; sale of goods by, 610; trustee's power to sell by, 855; puffing at, 963. *See* Bidding.
 Auctioneer, effect of mistake by, 972.
 Author, no specific performance of his contract to complete a book, 960.
 Author of the trust, 838, 840, 841, 843, 870.
 Authority, undue influence by person in, 554; to complete inchoate negotiable instrument, 679. *See* Agent, Partner.
 Authority to adopt, forgery of, 272.
 Awards, specific performance of, 972 and note 11.
 Bal bil wakk. *See* Conditional sale.
 Bail-bond, 592.
 Bailee, 621; delivery to, 621; care to be taken by, 622; making unauthorised use of goods bailed, 622; mixing goods, 623; his right to expenses, 624; death of, 624; liability of, 624; when not responsible for wrong delivery, 625; lien of, 626; his suit against wrong-doers, 628. *See* Bailment, Bailor, Pawnee.
 Bailiffs, their incapacity to buy actionable claims, 814. *See* Appraisers.
 Bailment, 621; when voidable, 622; when terminated by death, 624; by several joint owners, 625. *See* Pledge.
 Bailor, 621; must disclose faults, 621; to repay necessary expenses, 623; entitled to profit from goods bailed, 624; responsibility of, 625; his suits against wrong-doer, 628. *See* Pawnor.
 Balance of account, lien for, 626; due on mortgage, decree for, 793.
 Bangalore, 298.
 Bank. *See* Banker, Presidency banks, Savings-bank.
 Bank post-bills, 664 and note 2.
 Banker, 514, 674; criminal breach of trust by, 249; loan to, 521; lien of, 626; as drawee of cheque, 683, 700; when indorsement forged, 700; negligently dealing with bill presented for payment, 697; his rights and liabilities in case of crossed cheques, 716;

- disclosing state of customer's account, 946. *See* Breach of trust, Care-taking, Cheque, Drawee.
- Bankruptcy. *See* Insolvency.
- Baptism, forging register of, 272. *See* Forgery.
- Baroda, 3.
- Barriester, defined, 489; domicile of, 341; his incapacity to contract for his fees, 492, 516.
- Bars of house, 750.
- Barter, 510, 594, note 2.
- Bastard, domicile of origin of, 341; bequest to, 367, 377.
- Battery, 46.
- Bearer, bill drawn payable to, 660, 676 and note 2; cheque payable to, 660; bill indorsed in blank payable to, 692; payment of bill to, 700.
- Believe, reason to, 98.
- Benámi, 821. *See* Quasi-trust.
- Beneficial interest, 823; defined, 838; right to transfer, 862.
- Beneficiary, defined, 838; rights of, 861-866; liability of, 866, 867; rights and liabilities of transferee of, 867.
- Benefit, act done in good faith for, 120.
- Bequests, void, 385-390; with directions as to application or enjoyment, 404, 405; onerous, 395; contingent, 396, 397; conditional, 398-403; to an executor, 406; exoneration of, 419-421; of things described in general terms, 422; of the interest or produce of a fund, 423; of annuities, 424, 425; for illegal purpose, 874. *See* Legacies.
- Bestiality, 234, and Addenda.
- Betrothal, contract of, 958, note 7.
- Bets, 566, note 3. *See* Wager.
- Better security, protest for, 706.
- Bhaunagar-Gondal railway, 3.
- Biddings, pretended, 610.
- Bigamy, 34, 35. *See* Marriage.
- Bill of exchange, defined, 676; parties to, 682-688; negotiation of, 689-693; presentment of, 694-697; payment of and interest, 698; lost, 699; discharge from liability on, 700-702; dishonour of, 703, 711; notice of dishonour of, 703-705; noting and protesting, 706-708; acceptance and payment for honour of, 710; compensation in case of dishonour of, 712; special rules of evidence as to, 713, 714; in sets, 717; foreign, 718, 719. *See* Hundis, Maturity, Notaries.
- Bill of lading, 515, 659; in case of stoppage in transit, 603; title conveyed by possessor of, 605 and note 2; pledge of, 628; construction of, *see* Addenda.
- Bills of Exchange Act, 1882, 665.
- Birth, concealing, 318; forging register of, 272. *See* Miscarriage.
- Blank, filling up, 679, 680; indorsement in, 692.
- Blindness, 355.
- Board and lodging, 464.
- Boats, 8.
- Bodily distress, undue influence in case of, 554.
- Body-snatching, 32.
- Boilers, 8, 9, 10.
- Bombay, Baroda and Central India Railway, 3.
- Bombay Presidency, old penal law of, 2, 3; local laws in, 8.
- Bona fides. *See* Good faith.
- Bona vacantia, 832.
- Bond, negotiable, 659. *See* Administration-bond, Bail-bond.
- Bonitarian ownership, 821, note 1.
- 'Books', 370, note 2; of partnership, 521.
- Bottomry, 257 and note 1, 491, 524.
- Boundaries, expense of making, 785.
- Bovill's Act, 648, note 1.
- Breach of contract, effect of, 504, 505, 571; of promise to marry, 513; when time of essence, 578; consequences of, 588-593; no injunction to prevent, when contract not specifically enforceable, 988. *See* Compensation, Warranty.
- Breach of trust, criminal, 247-249; defined, 838; liability for, 848, and *see* 989; liability of beneficiary joining in, 866, 867; disadvantageous contract amounting to, 962; injunction to prevent, 984, 985, and note 1. *See* Theft.
- Breaking open closed receptacles, 266-267. *See* Criminal trespass.
- Bribe, in respect of official act, 149, 150, 151; offering a, 130, 133. *See* Gratification, Public servant.
- Bribing public servants, 29.
- Bridge, injuring, 258. *See* Mischief.
- 'British India, 94, 338, 488.
- Broker, criminal breach of trust by, 249; lien of, 626.
- Brothers, their right to intestate's property, 351.
- Buddhist, 295, 483; will of, 210, 314; administration to intestate, 315-321; law saved, 747, 812; gift by, 812, note 4.
- Buffalo, killing, &c. *See* Mischief.
- Buildings, 260, note 1, 262, note 1; negligence in pulling down or repairing, 199; erected by tenant, 802, note 7;

- specific performance of contracts relating to, 939, 953, 961, 965.
 Bull, killing etc., 258. *See* Mischief.
 Buoy, exhibiting false, 197; destroying, 259 and note 4. *See* Mischief.
 Burden of proof, 848.
 Burial, forging register of, 272.
 Burial-places, trespassing on, 202. *See* Corpses.
 Burma, local laws in, 9, 10. *See* Upper Burma.
 Burning, revocation of will by, 364.
 Buyer, of goods, transfer of ownership to, 595, 597, 598; bears subsequent loss, 597; delivery to, 599; part-delivery to, 600; insolvency of, 601; assigning bill of lading, 603; failing to perform, 605; title conveyed to, 605; refusing to accept, 610; of immoveable property, duties of, 730, 731; rights of, 730, 731, 771, 772; of one of two properties subject to a common charge, 772; under mortgagee's power of sale, 783, 817. *See* Price, Resale, Sale, Seller, Stoppage in transit, Warranty.
 Bye-laws, 486.
 Caeterorum, grant, 444.
 Calendar, British, 103, 487.
 Calls in respect of stock or shares specifically bequeathed, 420.
 Camel, killing etc., 258. *See* Mischief.
 Campbell's Act (9 & 10 Vic., c. 93), 460, note 5.
 Canal-water, 552, note 1.
 Canals, 8, 517; mortgage of, 781.
 Cancellation of certain documents, 275; of name of acceptor or indorser, 700; of instruments, 934, 976; of instruments in part, 977.
 Canon law, 931 and Addenda.
 Cantonments, 3 and note 1, 7, 8.
 Capacity, false measures of, 193; of testator, 301, 302; of parties to contract, 492, 552; of parties to bills etc., 682; of transferors, 749, 750. *See* Competence, Disability, Onerous gift.
 Capital of testator's estate applied to satisfy annuity, 425.
 Capital offence, giving false evidence with intent to procure conviction of, 167. *See* Death, Offence.
 Care, 103; to be taken by bailee, 622; by seller, 769; by trustee, 844, 845.
 Caretaking, contract for, 514.
 Carriage, contract of, 491, 515, 517. *See* Hackney Carriage.
 Carrier, criminal breach of trust by, 249; delivery to, 600. *See* Common carriers.
 Case of need. *See* Drawee in case of need.
 Cases decided by Courts, opinions respecting merits of, 287; how illustrations differ from, xxv.
 'Cash,' 370, note 2.
 Caste, intentional deprivation of, 33.
 Cattle-trespass, 7.
 Causa. *See* Consideration.
 Caution intended for good of person to whom it is conveyed, 289.
 Caveat, 453.
 Censure in good faith, 288.
 Central Provinces, local laws in, 9.
 Certainty in case of notes and bills, 676.
 Certificates, issuing, &c. false, 168; granted by administrator-general, 305, 860; granted by district court, 305.
 Cessate grant, 444.
 Ceylon, penal code of, 4.
 Champerty, 560, note.
 Change in thing specifically bequeathed, 417, 418; in dominant heritage, 919.
 Charge, on property for purchase-money paid in anticipation, 771, 772; on proceeds of revenue sale of mortgaged property, 785; of one of several co-mortgagors who redeems, 796; defined, 797-798; rights of persons having, 797, 798; extinguishment of, 798; of beneficiary on blended property, 865; of trustee on trust property, 852; on interest of beneficiary, 854. *See* Common charge.
 Charitable bequests, 302, 307 and note 5.
 Charitable endowments, 823 and note 1.
 Charitable uses, bequest to, 390. *See* Cyprès.
 Charter-party, 515; no specific performance of, 960 and note 7.
 Cheating, 59, 60, 251-254; by personation, 253, 254; forgery for purpose of, 272.
 'Cheque,' defined, 676; to bearer, 660; payable on demand, 679; liability of drawee, 683; discharge from liability on, 700, 702; presentment of, 696, 700.
 Child, offences by, 117; consent by, 119-120; act for benefit of, 118; private defence against act of, 122; prevention of birth of, 214; causing death of unborn, 215; exposure of, 215; concealing body of, 215; advancement of, 353; in the womb, 377; actually or reputed to be legitimate, 377; bequest to, 389. *See* Abduction, Hotchpot, Miscarriage.
 Children, 12; bequest to A and his,

- 375; defined, 376; bequest to *B's*, 383; marriage of, 37 and Addenda.
- Choses in action, 498. *See* Actionable claims, Contractual rights, Debts, Negotiable instruments.
- Christians, Native, xxi, 483, note 1, 484.
- Circles of issue, 504.
- Circumvention, 971.
- Citations, 452, 453.
- Civil Procedure Code, regulates practice in granting probate and administration, 448; in contentious cases, 457; as to powers of attorney, 519, note 7; as to negotiable instruments, 664; as to specific performance, 933, note 4.
- Civil service, domicile of member of Indian, 331. *See* Public servant.
- Claim, fraudulent, 172, 173; transfer of actionable, 813, 814.
- Class, addition to bequest of words describing a, 375; construction of gift to, 382-384 and Addenda; bequest to class as to some of whom it is in-operative, 388; to such members of class as attain to particular age, 393; transfer to, 752, 754.
- Clerks, possession of, 98; theft by, 239; criminal breach of trust by, 249; their incapacity to buy actionable claims, 814.
- Cloak-rooms, 514.
- Closed receptacle, dishonestly breaking open, 266, 267.
- Coast-lights, 9, 10.
- Codicil, defined, 338, 339; effect of attesting, 362; revocation of, 363; revival of, 364, 365; separate probate of, 434; found after grant of letters *c. t. a.*, 445.
- Codification, history of Indian, x-xx.
- Coercion, 494; defined, 554; will obtained by, 356; content caused by, 556; liability of person to whom money has been paid under, 533, 586; revocation of bequest prevented by, 874. *See* Voidable contract.
- Co-executor, 304, 461, 462.
- Coffee-stealing, 8.
- Cohabitation, caused by deceit, 281; when an immoral consideration, 561. *See* Concubinage, Marriage.
- Coin, defined, 184; offences relating to, 30, 31, 184-190, and *see* Arrangement of sections, p. 81; 'Queen's coin,' 184; diminishing weight, or altering composition or appearance of, 188; uttering altered, 189, 190; possessing altered, 189. *See* Gold coin, Legal tender, Money.
- Collateral consanguinity, 344.
- 'Collateral relationship,' 377.
- Collection of deceased's property, 464.
- Collector may be a 'judge,' 95; a 'public servant,' 95-96.
- Colonial Courts Act, 5.
- Colour of an office, act done under, 153, note 6.
- Combustible matter, rash or negligent conduct respecting, 198.
- Comfortable enjoyment of air, 916; of house, 897, 985.
- Command of the State, 12.
- Comments on measures of Government, 138.
- Commerce, advancement of, 792.
- Commission, on assets, 305; agent's lien for, 640; of receiver, 819; received by manager, 946.
- Commissioned officer a 'public servant,' 21.
- Commissions, Indian Law, x, xi, xiii, xviii.
- Commitment, illegal, 179.
- Committee, of lunatic, grant of administration to, 441; of lunatic or idiot mortgagor, 794; specific performance enforced against, 971.
- Common carriers, 515, 546, note 1, 622, note 3; liability of, 515.
- Common charge, sale of one of two properties subject to, 772.
- Common intention, 100.
- Common law of England, 513.
- Common object of unlawful assembly, 145.
- Commorientes, 307, note 1.
- Communications, in good faith, 121; of proposals, 548; of acceptance, 548; of revocation, 548; of agent with principal, 638.
- Commutation of sentence, 24, 105, 106, 107.
- Companies, 7, 552, note 1; included in 'person,' 94, 338, 487; contracts of, 497; transfer of shares in, 499; servants of, 517; limited by guarantee, 527; ratification by, 532; execution of bills and notes by, 664; acting as bankers, 674; amalgamation of, 965, 966, 970. *See* Directors, Promoters, Railway companies, Shares, Ultra vires.
- Compensation, for something done by promisee, 562; for loss caused by one party preventing the other from performing reciprocal promise, 577; for non-performance of impossible or unlawful act, 579; by person who has received advantage under void agreement, 583; by person enjoying benefit of non-gratuitous act, 586; for damage caused by breach of con-

- tract, 505, 588-591; where sum named as payable in case of breach, 592; where contract rightfully rescinded, 593; in case of breach of warranty, 609; in suit by bailee or bailor against wrong-doer, 628; for revocation, or renunciation of agency, 635; for extra trouble thrown on co-partner, 651, note 2; for dishonour of note, bill, or cheque, 712; to party deprived of thing received in exchange, 737; for improper exercise of mortgagee's power of sale, 783; for extinguishment or suspension of easement, 923; in addition to or substitution for specific performance, 956, 957; no right to, when suit for specific performance dismissed, 931, 972; where contract rescinded, 593, 976; where instrument cancelled, 977. *See* Assessment, Damages.
- Compensatory remedy, 920.
- Competence to make wills, 355; to contract, 552, 553; to make etc. notes etc., 682; to transfer property, 749, 750. *See* Capacity, Disability.
- Completion of title to thing bequeathed, 420.
- Composition, trustee's power to accept or make, 857; of debts, 877.
- Compound interest, 849.
- Compounding offences, 175, 176, 561 and note 3.
- Compromise of suit, 516; family, 953, note 4; of doubtful rights, 965 and notes 3, 4.
- Compulsion, 16, 121, 122. *See* Coercion.
- Computing, degrees of kindred, 345; time of payment of bill etc., 680, 681.
- Concealment, when it amounts to abetment, 127; of design to commit offences, 134, 135; of design to wage war against Queen, 137; of State prisoners and prisoners of war, 139; of deserters, 141; of documents to prevent their production, 171; of property to prevent its being taken as a forfeiture, 171; of offenders, 174, 175, 176, 177; of birth, 44, 215; of kidnapped person, 231; active, 555; assent obtained by, 971; guarantee obtained by, 618; of material fact by agent, 638; of necessity to maintain embankment, 663; of right of way, 975. *See* Silence.
- Conclusiveness, of probate and letters of administration, 449; of application therefor, 450.
- Concubinage, agreement for, 561.
- Concurrence necessary to validate title, 956.
- Concurrent offences, 24.
- Condition, precedent, 398; fulfilment of, 755; subsequent, 401, note 1; discharge by performance of, 502, 503, 756; revocation of proposal by acceptor's failure to fulfil, 550; acceptance of proposal by performing, 550; of bailment, 622; restraining alienation, 727, 750; making interest determinable on insolvency or attempted alienation, 751; fulfilment of, 755, 756; that transfer shall cease to have effect, 756, 757; of re-entry, 748, 806; easement on, 896; extinction of easements by performance of, 918, 919; enabling vendor to annul sale, 974, note 6; for compensation for misdescription, 974, note 6. *See* Cypres.
- Conditional, assent to a legacy, 469; bequests, 307, 308, 398-403; delivery of instrument absolute in form, 676, note 4; delivery, 689; indorsement, 691; acceptance, 701; gifts, 811, note 3; remission of punishment, 183.
- Conditional sale, mortgage by, 774, 781; foreclosure under, 795.
- Conditional transfer, 754, 757.
- Conditions of sale, 855.
- Confession, causing hurt to extort, 219, 220.
- Confidence, 554. *See* Trust, Undue influence.
- Confinement, of kidnapped person, 231; of exercise of easement, 908. *See* Escape, Wrongful confinement.
- Conflict of laws, 663, 664.
- Connivance, in adultery, 283, note 5; of contractor, 555.
- Consanguinity, 299, 344, 345; table of, 346.
- Consent, 14, 15, 118, 119, 120; of guardians, 15, 16; death caused with person's own, 209; conditions as to marriage with, 399; of husband to wife's taking out probate, 434, or administration, 435; defined, 553; caused by coercion etc., 556; variance made without surety's, 614; mixing goods without bailor's, 623; of all partners to annul or alter partnership contract, 650; of beneficiaries to modify trust, 843; to renounce trust, 859; to sale, 968.
- Conservancy, 8.
- Consideration, 497, 546; will made for valuable, 363; for legacy, 466, note 5; when lawful, 559; not needed to create agency, 629; negotiable in-

- strument made, &c. without, 686; partial absence or failure of, 687; unlawful, 693; presumption as to, 713. *See* Value.
- Conspiracy, 127 and note 1, 129; to rebel, 136. *See* Abetment.
- Conspirators, 64.
- Construction, *xx*; of penal laws, 71, 72; of wills, 366-384; and *see* Arrangement of sections, pp. 325-326; of other instruments, 501; of power of attorney, 520, note 1.
- Constructive delivery, 689; trusts, 822, 830, 877.
- Consul, domicile of, 342.
- Consumption, loan for, 511.
- Contagious diseases, 7.
- Contempts of authority of public servants, 30, 155-163; of Court, 183 and Addenda. *See* Arrangement of sections, p. 791, Public servant.
- Contentious cases, procedure in, 457.
- Contents of lost will, probate of, 439.
- Context, word supplied from, 367.
- Contingent contract, 567-569; interest, 753; legacy, 392, 396, 397; liabilities, 469. *See* Election, Indemnity, Lapse.
- Continuing, guarantee, 613; revocation of, 613, 614, 654; breach, no injunction to prevent when applicant has acquiesced, 989; disturbance of easement, 916, note 6; nuisance after injunction to discontinue, 200.
- Continuous, easement, 895, 901 and note 2; duty, contract involving performance of, 931, 959, 962.
- Contract, criminal breach of, 62; analysis of, 492; discharge of, 501; of record, 506; when voidable, 556; caused by mistake, 558; contingent, 567-569; performance of, 570-584; time and place for performing, 574-576; which need not be performed, 581; relations resembling those created by, 585; consequences of breaking, 588-593; sale of goods, 594-610; sale of immovable property, 768-773; mortgage of immovable property, 774-799; of debt, 815; lease of immovable property, 800-808; exchange, 809; of guarantee, 509, 612; of indemnity, 509, 611; of bailment, 621; of agency, 629-646; of partnership, 647-655; acquisition of property with notice of existing, 876; to buy property to be held on trust, 877; specific performance of, 952-972.
- Contract Act, 545-657; Introduction to, 491-534.
- Contracts, classified, 509; what agreements are, 552.
- Contribution by joint promisor, 573 and note 3; of co-sureties, 619; by mortgagees, 733; to mortgage debt, 790; as between co-trustees, 851; suits for, 585, note 6.
- Contributory negligence, 197, note 4.
- Convenience. *See* Nuisance.
- Conversion of property, 245-248. *See* Breach of trust, Misappropriation.
- Conveyance, containing false statement of consideration, 255; execution of, 769; to purchaser, 818.
- Conviction, offences committed after, 113-114; of partner, 521.
- Convicts, 492.
- Coolies, 8.
- Coorg, local laws in, 10; Native Christians in, 484.
- Co-owners, transfer by, 763, 764, 765; acquisition of easement by, 900.
- Co-partners, partner's power to bind, 649.
- Copies of title-deeds, 770; beneficiary's right to, 862.
- Copy of will, probate of, 439.
- Copyright, 552, note 1; injunction to restrain piracy of, 986, 987 and note 1.
- Coroners, 7, 96, note 3.
- Corporation, may take land by devise, 303; included in 'person,' 338, 487; may be named executor, 434, note 4; limits of contractual capacity of, 492; acting as bankers, 674; notes etc. made etc. by, 682; enforcement of duty of, 981. *See* Company, Mortmain, Syndics, Ultra vires.
- 'Corruption,' 'corruptly,' 11.
- Corruption of blood, 21.
- 'Corruptly,' 11, 168, 169, 179.
- Corpses, insults offered to, 32, 202.
- Costs, 611; of enforcing production of testamentary papers, 448; of probate or letters of administration, 464 and note 4; of indemnity-holder, 611; charge for, 772; of enforcing security, 781, note 1; of mortgagee subsequent to decree, 796; of trustee, 854, 861, note 2; of applications for order to enforce public duty, 982.
- Co-sureties, release of one, 616; liability of, 619, 620.
- Co-trustees, non-liability for default of, 850; several liability of, 851; contribution as between, 851; cannot act singly, 859.
- Counterfeit, 98; coin, uttering, 186; possessing, 187; property or trademark, selling goods marked with,

- 277; seal, making or possessing with intent to forge, 273, 274.
- Counterfeiting coin, 184, 185, 186; making or selling instrument for, 185, 190, 191; possessing instrument or material for, 185, 190; stamps, 190; selling, possessing, or using as genuine, 191; mark used for authenticating documents, 274-275; trade or property mark, 276, 277. *See* Coin, Forgery, Government stamp.
- Coupons, transfer of, 499; not negotiable, 659, note.
- Court-fees, 978, note 3; on certificates, 305.
- 'Court of Justice,' 95, 96; summons to produce document in, 155, 156, 157; to attend in, 156; process issued by, 162; contempt of, 183; forging records of, 272. *See* Contempt, Defamation, High Court.
- Court of Survey, judges and assessors of, 96, note 3.
- Court of Wards, 749, 803.
- 'Cousins,' 376.
- Covenanted servant, a 'public servant,' 21.
- Coverture. *See* Husband, Married Woman.
- Cow, killing etc., 258. *See* Mischief.
- Cowries, 184.
- Creation, of agency, 629; of trusts, 839-841; contract for, 509, 514.
- Creditors, removal of property to prevent distribution among, 254, 255; preventing debt due to offender being made available for, 255; debtors marrying, 296; legacies to, 426; grant of administration to, 438; priority of, 464, 465; to bring certain payments into account before sharing proceeds of land, 466. *See* Debt, Guarantee.
- Crimen expilatae haereditatis, 58.
- Criminal, act, agent employed to do, 641; breach of trust, 54, 57, 247-249; force, 46, 224-228; intention, absence of, 116; intimidation, 53, 290, 291; law of India before 1862, 2; matter, no injunction to stay proceedings in, 988; misappropriation, 54, 57; trespass, 261-267; tribes, 7. *See* Compounding, Private defence.
- Crops, mortgage of future, 744; evicted transferee's right to, 766; lessee's right to, 802 and note 9. *See* Cultivation, Stock on farm.
- Crossed cheques, 663, 715, 716.
- Crown, when it succeeds to intestate's property, 348. *See* Government.
- Crown-debts, 465, note 3.
- Cruelty to animals, 8, 34.
- Culpable homicide, 39, 40, 204, 206, note 1, 207, 208, 209, 210.
- Cultivation, contract for, 960, 961; improper, by intended lessee, 967; injunction to restrain, 985.
- Cumulative punishments, 24, 131; legacies, 378.
- Currency note, when legal tender, 504.
- Curtsey, tenancy by, 296.
- Custody. *See* Apprehension, Escape, Harboursing.
- Custom, of trade, 546 and note 1; warranty established by, 607; as to employing sub-agent, 631; permitting sale of trusteeship, 875, note 1; immoral, 978, note 3; must not contravene law, 904, note 10.
- Customary easements, 907; incidents of, 908.
- Customary law, 831. *See* Usage.
- Customs duty, 7, 485, 490; lien for, 530.
- Cutting, causing hurt by, 217, 218.
- Cy-près doctrine, 390, note 5; performance of condition, 398.
- Dacoits, belonging to gang of, 244.
- Dacoity, 59, 65, 243, 244, 245. *See* Robbery, Theft.
- Damages, 611; rules as to, 505; measure of, 518; note, 522, 588-592. *See* Compensation.
- Dámdupat, 546, note 1.
- Dangerous goods, sending by carrier, 515.
- Date of negotiable instrument, alteration of, 701; presumption as to, 713.
- 'Daughter' means legitimate daughter, 377. *See* Children.
- Days of grace, 660, 662, 680.
- Deaf-mutes, 13; testamentary capacity of, 355.
- Deaf person, will of, 355.
- Death, 18, 19, 25; defined, 103, 104, 105; caused by exercise of right of defence, 124, 125; abetting offence punishable with, 132; concealing such offence, 134; acceleration of, 205; caused by rash or negligent act not amounting to culpable homicide, 210; gift in contemplation of, 431; of proposer, 550; of promisor before performance, 519, 570; of surety, 614; of gratuitous bailor or bailee, 624; of pawnee or pawnor, 627, note 6; of principal or agent, 634; agent's duty on principal's, 636; of partner, 521, 652; of drawee, maker or acceptor, 696-7; of person to whom notice of dishonour is sent, 704; of donee before acceptance, 810. *See* Accident,

- Offence, Operation of law, Private defence.
- 'Debenture,' 370, note 2; of Secretary of State in Council, assignment of, 499; not a promissory note, 659, note.
- De bonis non, grants, 444.
- Debt, release of, 296; bequest of, 412; incidents of, 750; liability of transferee of, 814; mortgage of, 815; power to allow time for payment of, 857; injunction to restrain suit for, 986. *See* Agreement, Debtor, Debts.
- Debtor, marrying creditor, 296; becoming creditor's legal representative, 874.
- 'Debts,' 370, note 2; of deceased, 463, 466; of partnership, partners' liability for, 649; payment of partnership, 655; payment of partners', 655; mortgage of, 738, 815; transfer of, 498, 813; trust for payment of, 843, 871; compounding, 877.
- Deccan Agriculturists Relief Act, 512, 776.
- Deceased, misappropriating property of, 247.
- Deceased partner, liability of estate of, 654.
- Deceased wife's sister, marriage with, 37, note 4, and Addenda.
- 'Deceitful means,' 230.
- Decency. *See* Nuisance, Obscenity.
- Declaration before a public servant, 103 and note 4, 169; of desire to acquire Indian domicile, 344. *See* False evidence.
- Declarator, Scotch action of, 934, 935.
- Declaratory decrees, 934-936, 978-980.
- Decrease in value of property sold, 771.
- Decree, fraudulently suffering, 172; fraudulently obtaining, 173; discharges right of action arising from breach of contract, 506; assignment of, 552, note 1; in foreclosure suit, 791; for sale, 792; in redemption suit, 794, 795.
- Deed, fraudulent, 255. *See* Fraudulent dispositions.
- Defamation, 47-52, 285-289, and Arrangement of sections, p. 89; non-survival of right to sue for, 460.
- Defamatory matter, injunction to restrain publication of, 988, and note 1.
- Defective title, rent bona fide paid to holder under, 765; improvements made and crops sown by holder under, 766; contract to sell or let by one having, 932, 967.
- Defects in property, disclosure of, 769; in property leased, 801; duty of grantor of license to disclose, 925.
- Defence. *See* Private right of defence.
- Definition. *See* Explanation.
- Degrees of kindred, 345, 346.
- Delay of carrier, 515; in suing for specific performance, 932, 962, note 6; circumstances constituting, 989, note 5.
- Delegation of authority, 631; of trust, 859.
- Deliberation, drawee's time for, 695, 700.
- Delirium, contract by person in state of, 553.
- Delivery of goods sold, 594, 599; postponement of, 595; to wharfinger or carrier, 600; application for, 601; time and place of, 601; of note, bill or cheque, 689; negotiation by, 689; on payment of note, bill, or cheque, 699; of possession, 769; of specific movable property, 951.
- Demand, instruments payable on, 679.
- Demonstrative legacies, 411, 412; non-ademption of, 414; right under, 467.
- Dependent relative revocation, 363, note 5.
- Deposit of will, 390; after probate, 433, 514, 624; of title-deeds, mortgage by, 775; in Court of mortgage-moneys, 790, 791; of trust-money in savings-bank, 826, 848.
- Depredation on territories of friendly power, 138.
- Deputies, of official superior, 489.
- Derivative executorship, 304.
- 'Descendants,' 376.
- Description in will of property, 372.
- Deserters, 7; harbouring, 141; concealing, 141.
- Desertion, abetting, 141; of children, 437, note 5.
- Destination du père de famille, 901, note 2.
- Destroyed will, probate of, 438.
- Destruction of will, 363; of goods sold, 597; of goods bailed, 622; of immoveable property sold, 771; of mortgaged property, 782; of immoveable property leased, 802; of servant heritage, 883; of dominant or servant heritage, 920; of part of subject of contract, 959; of partnership property, 985; by Hindú widow, 985; by member of undivided family, 985. *See* Impossibility.
- Detention, in a reformatory, 18, 24; in reformatory settlements, 18.
- Deterioration, by use, 97, note 5; of thing bailed, 622.
- Determination of lease, 805 and note 5, 806.

- Devastavit, husband's liability for, 304; executor's liability for, 481, 482.
- Devasthana, 748, note 1.
- Device. *See* Forgery, Mark.
- Devolution of joint rights to claim performance, 574.
- Dharṇa, sitting, 53, 291.
- Digging sand or gravel, injunction to restrain, 984.
- Diluvion, diminution of dominant heritage by, 913.
- Directors, in position of trustees, 874, note 8; mandamus to enforce rights of, 982; injunction to restrain, 984. *See* Companies, Dividend.
- Disability, election postponed in case of, 430, 759.
- Disaffection, imputations intended to excite, 52.
- Disah, 298.
- Discharge, of contract, 501; of surety by creditor's act or omission, 616, 617; from liability on notes, bills, or cheques, 685, 700-702; of incumbences on sale, 772, 773; of trustee, 868; of co-trustee, 870.
- Discipline, want of, 141.
- Disclaimer by beneficiary, 841; of trust, 842.
- Discontinuous easement, 895, 901, note 2.
- Discretion as to decreeing specific performance, 962; as to making declaratory decrees, 978 and note 3; of public body, 988, note 4.
- Discretionary power, 859.
- Disfiguration when 'grievous hurt,' 216.
- 'Dishonestly,' 98.
- Dishonour, assault with intent to, 228; by non-acceptance, 703; by non-payment, 703; by drawee in case of need, 711; presumption as to, 713, 714. *See* Protest.
- Dilocation, when 'grievous hurt,' 216.
- Dismissal of suit for specific performance, 931, 972.
- Disobedience to order of public servant, 156 and note 4, 162.
- Disobeying law with intent etc., 152; with intent to save person from punishment, 178.
- Dispositions of property. *See* Fraudulent dispositions.
- Dispossession of immovable property, 949.
- Disqualified person, transfer to or by, 749; onerous gift to, 812.
- Dissolution of partnership, 521, 655.
- Distress for rent, 460 and note 1; 530.
- Distribution of intestate's property, 349-353; in discharge of lawful claims of which executor has notice, 478-9.
- District delegates, 447, 449.
- District judge, 328, 488; his jurisdiction in granting and revoking probate and administration, 447, 448, 449; to protect deceased's property, 448; administration-bond to, 445; to file original wills, 456; appeals from, 457.
- Disturbance of easement, 884, 885, 915, 916.
- Dividend, injunction to restrain payment of, 984.
- Divine displeasure, inducing one to believe that he will by offender's act become object of, 291.
- Divorce, effect on wife's domicile, 343; on her right to administer, 437, note 5; non-survival of right to sue for, 461.
- Dock-warrants, 605, 659 and note 3.
- 'Document,' 98, 99; framing incorrect with intent etc., 153; omitting to produce, 156; fabricating, 165; destroying, 171; making false, 264, 273; known to be forged possessing with intent to use as genuine, 274. *See* Certificate, Cheating, Forgery, and Arrangement of sections, p. 88.
- Domestic servants, 517, breach of contract by, 63, 64, 464 and note 6.
- Domicile, 299, 340-343, and Arrangement of sections, p. 322; acquisition of new, 341; continuance of new, 342; payment of debts in accordance with law of deceased's, 495. *See* Divorce.
- Dominant heritage, 894.
- Donations mortis causa, 309, 431, 432.
- 'Donee,' 'donor' defined, 812.
- Doors, 750.
- Double ownership in English trusts, 821, note 1.
- Doubt as to which of several offences a person is guilty, 112; title free from reasonable, 967.
- Dower, 296, 299; deferred, 529, note 9.
- Dower Act, 296, note 2, 298.
- Draft of lost will, probate of, 439.
- Drainage, obstructing public, 259. *See* Mischief.
- Dramatic performances, 7.
- 'Drawee,' defined, 677; acceptance by person other than, 684; his time for deliberation, 695, 700.
- 'Drawee in case of need,' 677, 711.
- Drawee of cheque, his liability, 683.
- 'Drawer,' defined, 676; liability of, 683, 684, 685.
- Driving, rash or negligent, 197.

- Drugs, adulterating, 195, 196; selling adulterated, 196; selling one drug as another, 196.
- Drunken person, annoyance by, 53, 292.
- Drunkennes, 13, 117 and note 3, 118, 355; contracts by person in state of, 553. *See* Annoyance, Intoxication.
- Dumbness, 355.
- Duplicate of lost bill, holder's right to, 662, 687, 688.
- Duration of lease, 800; of lease for a year, 805.
- Duress. *See* Coercion.
- Duties, of executors and administrators, 463-467; of trustees, 843-848. *See* Public servant.
- Duty of customs or excise, 490.
- Ear, privation of hearing of, 216.
- Earnest, 594 and note 4; charge for, 772.
- Easements, 880; imposition, acquisition, and transfer of, 899-907; transfer of, 748, 750, 907; disturbance of, 915, 916; incidents of, 908-914; extinction, suspension, and revival of, 917-923. *See* Abatement.
- Easements Act, 892-927; Introduction to, 879-888.
- East Indians, xi, xxi; Succession Act applies to, 295, 337.
- Education of minor, 856, 857.
- Effacing writing from stamped substance, 191.
- Effects unadministered, grants of, 444.
- Election, under a will, 308, 427-430; under a transfer, 727, 758, 759; by creditor, to charge agent or principal, 645; by minor partner, 649; by lessee, 804, 805. *See* Postponement.
- Elephants, 7; killing etc., 258. *See* Mischief.
- Emasculation, 216.
- Embankments, 8, 9, 911, note 4.
- Embezzlement by public servants, 8.
- Emblements, 735, 778, note 3, 802 and note 9.
- Emergency, agent's authority in, 630.
- Employers and workmen, 517.
- Emigration, 7, 8, 552, note 1.
- Emigration-officers, 96, note 3.
- Encroachment, by tenant on adjoining land, 804, note 1; on property leased, 803, 804.
- Endorsement, Endorsee. *See* Indorsement, Indorsee.
- Enforcement of public duties, 936, 980.
- Engagement, 575, 772.
- English mortgage, 775; between Hindus, 775, 782; foreclosure or sale under, 795.
- Engraving defamatory matter, 289.
- Enjoyment, bequest with direction as to, 404.
- Enlarging time. *See* Extension, Postponement.
- Enquiry as to subject or object of will, etc., 362.
- Enticing away married woman, 283.
- Entireties, estate by, 296.
- Entry of lessor, 736, 803.
- Epistulae. *See* Rescripts.
- 'Equally,' 381.
- Erasure of mark denoting that stamp has been used, 192; in will, *see* Alteration, Obliteration.
- Escape, from custody, 181; of prisoners of state or war, 138, 139; negligently suffered by public servant, 180, 182; harbouring persons escaping from lawful custody, 117; suffering, 179, 180. *See* Rescue, Return from transportation.
- Escheat, 21; of beneficiaries' interest, 832.
- Estate tail, cannot be created by will, 375.
- Estoppel as to notes, bills, and cheques, 663, 664; against denying validity of note, bill, or cheque, 714; against denying capacity of payee to endorse, 714; against denying signature of prior party, 714; tenancy by, 803, note 1; acquisition of easement by, 882; fed by subsequently acquired interest, 956, note 3.
- Eunuchs, 229, note 2. *See* Emasculation.
- Eurasians. *See* East Indians.
- European vagrancy, 7.
- Europeans punishable with transportation, 20, 108; Succession Act applies to, 295, 337.
- Eviction, licensee's rights on, 927.
- Evidence of commission of offence, causing disappearance of, 169; destroying, 171; when admissible in case of ambiguity, 369; of contents of lost will, 439. *See* Burden of proof, Estoppel, False evidence, Presumption, Witness.
- Evidence Act, as to terms of contract, 501; as to negotiable instruments, 664.
- Exception, grants of probate or administration with, 443, 444. *See* General exceptions.
- Excess of agent's authority, 642.
- Excessive force, 123, note 5.
- Exchange, 510, 594, note 2, 809.
- Exchanges, 737.
- Excise, 7, 8, 9, 10, 490.
- Exciting disaffection, 137, 138.

- Exclusion of day on which term commences,** 805.
Excommunication, etc., 33, 228, note 2.
Execution, of unprivileged wills, 358; of privileged wills, 360, 361; of order enforcing public duties, 982. *See* Attestation.
Executive government, 94.
Executor, 339; bequests to, 308, 406; assets vest in, 433; probate to, 433, 434; appointment of, 433; renunciation by, 436; powers of, 460-462; duties of, 463-467; assent of, 468-470; payment by, 470; liable for devastavit, 481; specific performance enforced against, 970, note 2; injunction against, 984. *See* Assets, Legal representative, Refunding.
Executor of his own wrong, 306, 458, 459.
Exoneration of legacies, 419-421.
'Expecting to be a public servant,' 149.
Expenses, of funeral, 474; of obtaining probate or administration, 474; to be repaid by bailor, 623, 624.
Expiry of term of partnership, 653; of lease, 805-6.
Explanation of words and terms, 93-103.
Explosive substance, 7; rash or negligent conduct respecting, 198, 199 and note 2; causing hurt by, 217, 218; mischief by, 259, 260.
Export of counterfeit coin, 186.
Exposure of children, 44, 215.
Express promise, 551.
Expulsion of partner, 652 and note 3.
Extension of time for performing promise, 582; for payment of mortgage-money, 792.
Extent of easements, 884, 912.
Extinction of trusts, 871; of easements, 885, 917. *See* Merger.
Extinctive prescription, 886.
Extinguishment of rights of action on bill in acceptor's hands, 702.
Extortion, 58, 59, 218, 219, 239-242. *See* Robbery.
Extradition, 6, 7, 177.
Extraordinary expenses, to which pawnee entitled, 627.
Extraordinary partnerships, 655.
Extra-territorial offences, 6; operation of Penal Code, 4, 5.
Eye, destroying, 216.
Fabricating false evidence, 165.
Fact. *See* Mistake.
Factor, criminal breach of trust by, 249; lien of, 626.
Factories, 7.
Factors' Act of 1877, 599 note.
'Factory,' 370, note 2.
Factory Acts, 33.
Failure of consideration, total, 686; partial, 687.
Faith. *See* Good Faith.
False averment in petition for probate, etc., 452.
False certificate, issuing or signing, or using as true, 168.
False charge with intent to injure, 173.
False claim in court, dishonestly making, 173.
False document, 268, 269. *See* 'Document'.
False entry in books, 165.
False evidence, 30, 164-169, and *see* Arrangement of sections, p. 80.
False information, to public servant, 157, 158, 159, 160; respecting offence 169, 170.
False lights, marks, or buoys, 197.
False marks on packages, 277, 278.
False reports, circulating with intent, 53, 291.
False statement, on oath to public servant, 159; in declaration, receivable in evidence, 169.
'False weights,' 'false measures,' 193.
Family, bequest to, 373.
Family compromise, 953, note 4.
Family idol, trust for maintenance of 821 and note 5.
Farcy. *See* Glanders.
Farmer of defaulting estate, 749.
Father, 489; his right to intestate's property, 351; his obligation to support his children, 585 and note 4.
Fear. *See* Coercion.
Feelings, wounding, 202; wounding religious, 203.
Fees for medical attendance, 464.
Female infants, 7.
Ferries, 8, 9, 10.
Fictitious name, acceptance of bill drawn in, 686.
Fictitious payee, 676, note 2.
Fiduciary, advantage gained by, 874, 875, 946.
Fiduciary relations, undue influence in case of, 554; frequent in India, 821.
Fighting, disturbing public peace by, 148; culpable homicide while, 209.
Filing wills, 246.
Finder of goods, 533; responsibility of, 586; rights of, 625. *See* Criminal misappropriation.
Fine, 22, 23, 26; amount of, 109, 110; levy of, 111; recovery of, 490. *See* Punishment.
Fire, rash or negligent conduct respecting, 198; mischief by, 259, 260. *See*

- Explosive substance, Mischief, Vis major.
- Fire-insurance, 525, 765.
- Firm, defined, 647.
- Fish, possession of, 235, note 5, 285 note; right to take out of tidal waters, 895, note 3; riparian owner's right to, 898.
- Fisheries, 9, 261, note 2.
- Fixtures, 750; lessee's power to remove, 735, 802. *See* Immovable property.
- Flogging. *See* Whipping.
- Fœticide, 205.
- Food, adulterating, 195; selling noxious, 195.
- Forbearance of creditor to sue principal debtor, 616.
- Forbidden by law, 559, note 1.
- Force. *See* Coercion, Compulsion, Criminal force, Unlawful assembly.
- Forced labour, 233.
- Foreclosure or sale, mortgagee's right to, 780, 781; order for, in redemption-suit, 795.
- Foreclosure-suit, parties to, 791; decree in, 791; sale in, 793. *See* Deposit, Mortgagee, Mortgagor, Notice.
- Foreign bills, protest of, 707.
- Foreign country, trust of land situate in, 824, 839.
- Foreign currency, 675, note 3.
- Foreign domicile, 862.
- Foreign Government, no injunction to interfere with sovereign acts of, 988.
- Foreign instrument, 678.
- Foreign jurisdiction, 7.
- Foreign law, as to notes, bills, and cheques, 719.
- Foreign merchant, liability of agent contracting for, 643.
- Foreign recruiting, 7.
- Foreign stamp laws, 644, 719, note 2.
- Foreigners, 4, 7, 177, note 1.
- Forest officers, 96, note 3; trading, 153, note 3.
- Forest produce, lien on, 530.
- Forests, 7, 8, 9, 10.
- Forfeiture, 21, 26, 109; by mutineers, 7; for waging or preparing to wage war, 136, 137; for depredation, 138; removing property liable to, 171; fraudulently claiming property liable to, 172; disobeying law or framing record in order to save property from, 178; of lease, 736; of lessee's interest, 806; for non-payment of rent, relief against, 807; of beneficiary's interest, 826, 851, 852; specific performance of contract involving, 963, note 6. *See* Waiver.
- 'Forged document,' 273; cancellation of, 934, 977. *See* Forgery.
- Forged indorsement, 686; on cheque, 701; cancellation of, 934, 977.
- Forgery, 61, 268, 275.
- Form of caveat, 453; of grant of probate, 454; of grant of administration, 455.
- Formalities necessary for execution of wills, 302; of donations *mortis causa*, 309; of contract, 496, 497; of leases, 801; on declarations of trust, 840.
- Fractions of terms of punishment, 108.
- Fracture, 'grievous hurt,' 216.
- Framing incorrect document with intent, 153.
- Framing incorrect record with intent, etc., 178.
- Franchise, 981.
- Fraud, 98, note 2, 494, 824; will obtained by, 356; performance of condition prevented by, 403; in obtaining probate or administration, 445; defined, 555; consent caused by, 556, 557; in selling goods, 608; in pledging goods, 628; of sub-agent, 631; of agent, 646; of co-partner, liability for, 649; negotiation obtained by, 693; inalienability of right to sue for compensation for, 749; of prior mortgages, 788; of trustee, 854; on the public, contract involving, 966, note 7.
- Fraudulent alteration, 269, and Adenda.
- Fraudulent claim to property to prevent seizure, 254.
- Fraudulent deed, 254, 255. *See* Disposition of property, Fraud.
- Fraudulent dispositions, 172, 254, 255.
- Fraudulent insolvency, 60.
- Fraudulent removal of property, 171, 172, 254, 255.
- Fraudulent transfers, 206, 255, 729, 767, 975.
- 'Fraudulently,' 98; suffering a decree for sum not due, 172; obtaining decree for sum not due, 173.
- Free consent, 552, 553.
- Freight, lien for, 529, note 5.
- Freighter. *See* Charter-party.
- Frivolous complaints, 17, 122.
- Fugitive offenders, 7.
- Fugitive Offenders Act, 1881, 177.
- 'Funds,' 370, note 2.
- Funeral ceremonies, interruption of, 32, 202, 203.
- Funeral expenses, 464.
- Funeral of deceased, 463; of minor, 856, 857.
- Furnaces, 8.
- Further assurance, contract for, 509.
- Future advances, mortgage to secure, 788.

- Future property, gift cannot be made of, 810.
 Future rights, declaration of, 934, 978.
- Gahāp-lahap. *See* Conditional sale.
 Gain. *See* Wrongful gain.
 Gambling, 8, 9, 10, 34, 200, note 2, 201, note 7. *See* Wager.
 Gaming-house, 194, note 8.
 Gāro Hills, 10.
 Gender, 93, 487.
 General agent, 495. *See* Agent.
 General Clauses Act, 487-490; Introduction to, 485, 486.
 General Exceptions, 115-126, and *see* Arrangement of sections, pp. 76, 77.
 General Explanations, 93-105, and *see* Arrangement of sections, pp. 74, 75.
 General legacies, 409, 410.
 General lien, 530.
 General proposal, 493.
 General terms, bequest of thing described in, 422.
 General words understood in a restricted sense, 370.
 Genuineness of money, warranty of, 531, 809.
 Gestures, defamatory, 48.
 Gift, 509, 510, 737; defined, 810; onerous, 811, 812; universal, 812; promise to make a, 563; to public servant, 151; to objects of power in default of appointment, 379, 380.
 Gifts in contemplation of death, 309, 431, 432.
 Giving provocation with intent to cause riot, 146.
 Glanders and farcy, 9.
 Gold coin not legal tender, 504.
 'Good faith,' 103 and note 5; communications in, 121; censure or accusation in, 288; right of buyer of goods in, 605, 606; bailee delivering goods in, 625; agent acting in, 640, 641.
 Good Friday, 681.
 Good-will of partnership, 522; sale of, 564; sold for portion of profits of business, 648; specific performance of contract for sale of, 953, note 2.
 'Goods,' 370, note 2; defined, 594; sale of, 594-610; documents showing title to, 603, 605; exchange of, 809; gift of, 810; and *see* Contents, pp. 538-540.
 'Government,' 94; liens of, 530; contract with, 592; easement claimed over property belonging to, 905. *See* Comments, Executive government, Government of India, Post office, Queen, Revenue, State.
 'Government of India,' 94, 488; no injunction to interfere with department of, 988.
 Government securities, 574, note 3 (where for '1863, sec. 3' read '1886, sec. 5'), 679, note 3.
 Government stamps, offences relating to, 190, 191, 192; and *see* Arrangement of sections, p. 81.
 Governor in Council, exempt from power conferred by sec. 45 of Specific Relief Act, 981.
 Governor of a Presidency, assaulting, 137.
 Governor-General exempt from criminal jurisdiction, 4, note 1, 153, note 3.
 Governor-General in Council, 482, 981.
 Governors trading, 153, note 3.
 Grace, days of, 680.
 'Grandchildren,' 376.
 Grant of license, 924.
 Grant of probate and letters of administration, 433-438. *See* Limited grants.
 'Gratification,' 149; to influence public servants, 150, 151; accepting, to screen offender, 175; giving or offering, to screen offender, 176; taking, to help to recover stolen property, 176.
 Gratuitous bailment, 624.
 Grievous hurt, 44, 216, 221; kidnapping to subject to, 231; caused while committing lurking house-trespass or house-breaking, 266.
 Gross misconduct in partnership affairs, 652.
 Gross neglect, 788 and note 5.
 Guarantee, 525-527, 612; consideration for, 612; continuing, 613; revocation of, 613, 614; obtained by misrepresentation or concealment, 618; on contract that creditor shall not act till co-surety joins, 619. *See* Co-surety, Surety.
 Guaranteed railways, 499.
 Guardian, testamentary, 356; grant of administration to minor's, 440; of property of minor mortgagor, 794; ad litem, 799.
 Guardianship, 229, note 2.
 Guzerat, mortgages in, 731.
 Habitual theft, 65.
 Hackney carriages, 8, 9, 10.
 Haidarābād Assigned Districts, 298, and Addenda.
 Half-blood, 300, 344-5, 337.
 Harbours, 66; deserters, 141; offenders, 174, 177; persons hired for 'unlawful assembly, 147, 148; prisoners

- of state or war, 139. *See* Public Servant.
- Hard bargains, 559, note 3.
- Hardship, contract involving unforeseen, 963.
- Harm other than death, caused by right of defence, 125.
- Hazardous security, 844 and note 1.
- Headings of chapters and parts of Acts, xxii, note 2.
- Health, disobedience endangering, 162; offences affecting public, 194-197; of promisor, 519, note 3; advancement of, 752. *See* Atmosphere, Illness, Infection, Nuisance.
- Heir apparent's chance of succession, 748.
- Heirs, bequest to, 373; to A and his, 375. 'Her Majesty,' 488.
- Hereditary priestly office, 748, note 6.
- Hidden treasure, finder of, 533.
- High Courts, judgments of, xviii, xxv; defined, 339, 488; jurisdiction under the Succession Act, 457; under their letters patent, 933; in case of contempt, 1031. *See* Judge, Mandamus, Rules.
- High seas, offences on, 3, 91, note 2.
- Hindú administrator, 1032.
- Hindú endowments, 823.
- Hindú heirs, 306.
- Hindú law, 496, 498, 531, 580, note 1, 738, 810, note 5, 812, note 4, 824.
- Hindú widow, 71; her power to bequeath, 314, 761; transfer by, 750, note 1; declaration of invalidity of alienation by, 979; injunction against, 985.
- Hindú Wills Act, 313-315.
- Hindús, favour codification, xx; exempt from Succession Act, 483 and note 1; wills of, 310, 311, 312, and Addenda; administration to intestate, 316-321. *See* Undivided family.
- Hire, letting for, 512; of carriage, summary jurisdiction in disputes as to, 517; bailment for, 621.
- Hiring persons to join unlawful assembly, 145; to take part in unlawful assembly or riot, 148.
- Holder, 661; defined, 677; acquiring negotiable instrument after dishonour or maturity, 693; presumption as to, 713.
- 'Holder in due course,' defined, 677; rights of, 686, 693; holder deriving title from, 692.
- Holding over, 736; with lessor's assent, 808 and note 2.
- Holidays, notes and bills maturing on public, 662; excluded in calculating reasonable time, 709.
- Honour, act of, 707.
- Horse, killing etc. *See* Mischief.
- Horse-racing, 566.
- Hotchpot, 300, 353.
- Hours of business, 695.
- House, incidents of, 750.
- Housebreaking, 61, 65, 262, 263, 265, 266. *See* Criminal trespass.
- 'Household effects,' 'household furniture,' 'household goods,' 370, note 2.
- House-trespass, 61, 261, 264. *See* Criminal trespass.
- Howrah Bridge, 8.
- Human being, definition of, 11.
- Human body, offences affecting, 39, 204-234. *See* Arrangement of Sections, pp. 83-85.
- Hundis, 659, 660, 661, 673, note 1.
- Hurt, 44, 216, 217, 218, 219, 220, 221, 243. *See* Grievous hurt.
- Husband, harbouring or concealing his wife, 175, 178; his obligation to support his wife, 585, note 4; of attesting witness, bequest to, 362; his consent to wife's becoming executrix or administratrix, 434, 435. *See* Adultery, Divorce, Marriage, Rape.
- Hypothec, 530, 731.
- Idiot, 12, 117, 118, 119, 122, 209; cannot make a will, 355; or obtain probate, 434. *See* Committee, Forgery.
- Idol, delivery of, 951; *see* Family idol.
- Ignorance of impossibility of event on which contingent agreement depends, 569. *See* Mistake.
- 'Illegal,' 102. *See* Omission.
- Illegal, act, contract to do, 579; employing agent to do, 641; branch of alternative promise, 580; commitment or confinement, 179; condition, 398; consideration, 559, 693; purchase of property offered for sale by public servant, 161; purpose, transfer for, 874; bequest for, 347, 874.
- Illegitimate. *See* Bastard.
- Illicit intercourse, 230.
- Illness, undue influence over mind enfeebled by, 554; performance rendered impossible by, 519, 579, 580.
- Illustrations, xxiv, xxv, 12, 297.
- Immediate relation, 687.
- Immoral condition, 398; consideration, 559; custom, 978, note 3; purpose, 229, 232; object of agreement, 559.
- Immorality, 496, 559 and note 3.
- Immoveable property, 487, 552, note 1; defined, 747; rules as to transfer of, 748-767; sales of, 768-773; when combined with moveables, 597; mortgage of, 774-779; leases of, 800-808;

- exchange of, 809; gift of, 810-812; trusts relating to, 824, 840; recovery of specific, 949.
- Impartiality of trustee, 846.
- Imperfect title, purchaser's rights against vendor with, 956.
- Implied agency, 495, 629.
- Implied contract, 494; promise, 551; of seller of immovable property, 769, 770; of mortgagor, 779; of lessor, 801.
- Implied promise, 551; to indemnify surety, 527, 619.
- Implied trust, 840, 946.
- Importing counterfeit coin, 186.
- Importunity, will obtained by, 356.
- Imposition of easements, 899, 900.
- Impossibility of performance, discharge of contract by subsequent, 507.
- Impossible act, agreement to do, 495, 579.
- Impossible condition, 398.
- Impossible events, agreements contingent on, 568, 569.
- Impounding beneficiary's interest, 866, 867.
- Imprisonment, 20, 21, 25, 104, 108, 109, 110, 111, 113, 489; in default of paying fine, 109-111; abetting offence punishable with, 133; giving false evidence to procure conviction of offence punishable with, 168. *See* Fine, Punishment.
- Improvements made by bona fide holder under defective title, 766; in property, buyer entitled to benefit of, 771; allowance for, 975, note 5.
- Imputation in good faith, 288.
- Inadequacy of consideration, 498, 563, 971.
- Incapacity to acquire property, 109; to take beneficially under a will, 302; of partner, 652 and note 7; of judges etc. to buy actionable claims, 814. *See* Insanity, Intoxication.
- Incest, 37.
- Inchoate stamped instruments, 679.
- Incidents of property, 750; of easements, 908-914.
- Income, direction to accumulate, 389; apportioned on transfer, 760.
- Income-tax, 7.
- Incompetent person. *See* Guardian ad litem, Legal curator.
- Inconsistent, clauses, 372; interest, 862.
- Incorporated partnerships, 655.
- Incorporation of papers by reference, 359.
- Incorporeal tenements, 338 and note 1.
- Increase of goods bailed, 624; of easements, 884.
- Incumbered estates, managers of, 96, note 3.
- Incumbered property, bequests of, 308.
- Incumbrances, discharge of, on sale of immovable property, 731; seller's duty to discharge, 769. *See* Charges.
- Indemnity, 449; to meet contingent liabilities of deceased's estate, 466; of partner, 521; contract of, 505, 527, 528, 611, 612; in case of sale of shares, 611, note 2; of surety, 619; of agent, 640, 641; in case of lost note, bill or cheque, 699; of trustees, 852; from gainer by breach of trust, 854; specific performance with, 955, notes 2 and 5.
- Indian Marine, 7.
- Indian Museum, officers of, 96, note 3.
- Indian Succession Act, 1865, 337-484.
- Indigo factory, 649, note 1.
- Indigo plant, damages for breach of contract to supply, 588.
- Indirect loss or damage, 505, 588.
- Indivisibility of easements, 884.
- Indorsee, defined, 679; alteration by, 701.
- Indorsement, 99, 100; by one of several executors, 462; defined, 678, 679; 'in full,' 679; striking out, 685; forged, 686; delivery to complete, 689; in blank, 679, 690, 692; converted into full, 690; restrictive, 690, 691; negotiation by, 690; conditional, 691; for part of sum due, 692; suit to compel, 953. *See* Allonge.
- Indorser, defined, 679; liability of, 684; when a surety, 684, 685; discharge of his liability, 685; after alteration, 702; estoppels binding, 714.
- Infant marriage, 37, 38, 39.
- Infants, 67. *See* Minors.
- Infection, act likely to spread, 33, 194, 195.
- Influence. *See* Bribe, Gratification, Public servant, Undue influence.
- Information to public servant, 157, 159; to be furnished by trustee, 847. *See* Agent, Contempt, Public servant, Unlawful assembly.
- Infringement. *See* Patent.
- Injunctions, 983, 990; temporary, 983; perpetual, 983-987; not granted where full relief can be otherwise obtained, 989; premature applications for, 989, note 9; to restrain disturbance of easements, 916.
- 'Injury,' 102; consent given under fear of, 119; to goods sold, 597.
- Inland emigration, 8, 9, 10.
- Inland instrument, 678.
- Innkeepers, 514.
- Inoculation, 8, 9, 194, note 11.

- Inquiry in case of rectifying instrument,** 974.
- Insane offenders,** 7, 117; persons, 67; act done for, 118; consent of, 119; right of private defence against, 122; obtaining signature of, 269; domicile of, 343; partners, 652.
- Insanity, negatives capacity to make wills,** 355; or to contract, 553; of proposer, 550; of principal or agent, 634; of partner, 652. *See* **Lucid Interval, Lunatic, Proposer.**
- Insolvency,** 5, 508; procedure in, 255, note 1; assignment in case of, 499; of agent, 520; defined, 601; of buyer of goods, 602; of principal, 634; of partner, 652; presentment in case of, 696, 697; condition making interest terminate on, 751.
- Insolvent, not a proper trustee,** 863.
- Inspection, beneficiary's right of,** 862.
- Instalments, bill of exchange payable by,** 676; note payable by, 695; contracts to be performed by, 959.
- Instigation,** 127 and note 3.
- Instructions for will of soldier or mariner,** 361.
- Instrument, 747; of trust defined,** 838.
- Insubordination, abetting,** 141.
- Insufficient securities,** 780, 782, 884 and note 1, 900.
- Insult,** 53, 290, 292; to public servant in judicial proceeding, 183. *See* **Contempt, Intimidation.**
- Insurance,** 491, 509, 524; of mortgaged property, 785 and note 1; by receiver, 819.
- Insurance companies,** 525.
- Insurrection,** 136.
- Intention of testator,** 371; of parties, 974.
- Interdict de vi,** 529.
- Interest,** 512; on legacies, 476, 477; refunding of legacies to be without, 480; pawnee's right to retain for, 627; on note or bill, 698; on incumbrances, seller's duty to pay, 769; chargeable by mortgagee in possession, 784-5; cessation of, 791; when trustee committing breach of trust must pay, 848. *See* **Account, Arrears, Mortgage, Usury.**
- Interest in property,** 748, 753.
- Interest of a fund, bequest of,** 423.
- Interlineation in will,** 364.
- Interlocutory injunctions,** 937.
- International law, as to negotiable instruments,** 663, 718, 719.
- Interpleader suit, lien of plaintiff in,** 530; by bailee, 625, note 4.
- Interpretation, xx; of penal laws,** 71, 72; of wills, 309, 366-384; of contracts, 491, 500, 501. *See* **Construction.**
- Interpretation clause, xxii, note 5.**
- Interruption to public servant in judicial proceeding,** 228; of user of easement, 904, 905, note 1; of bills of lading, 1034. *See* **Contempt.**
- Intestacy,** 347, 348.
- Intestate succession,** 299-301.
- Intimidation,** 121, 290, 291. *See* **Criminal intimidation, Insult.**
- Intoxication,** 12, 13, 117 and note 3, 118 and note 1, 119, 269, 292; right of private defence in case of, 122; destroys power to make will, 355.
- Inundation, causing,** 259 and note 3. *See* **Mischief.**
- Invalidation of wills,** 303.
- Inventory of deceased's property,** 463.
- Investment, of funds to provide for legacies,** 410, 472-474; of trust funds, 825, 847; power to vary, 856.
- I. O. U. 533.**
- Irreconcilable clauses or gifts in will,** 372.
- Irregularity in notes or bills,** 679.
- Irrigation,** 8, 9; injuring works of, 258; right of government to regulate, 888, 892. *See* **Mischief.**
- 'Issue,'** 376.
- Jails,** 8.
- Jainas,** 482; wills of, 314.
- Jews, law relating to,** 295 and note 2, 301.
- Joint bailors,** 625.
- Joint debts due from partnership,** 655.
- Joint legatees,** 381.
- Joint liabilities, devolution of,** 572.
- Joint mortgagors, redemption by one,** 796, 1034.
- Joint-owners of goods, sale by one of several,** 606; bailment by one, 625.
- Joint promisees, offer to one of several,** 571; devolution of their rights, 574.
- Joint promisors, offer by one of several,** 571, note 4; devolution of liabilities of, 572; any one of, may be compelled to perform, 572, 573; release of one, 574. *See* **Contribution.**
- Joint-stock companies,** 655 and note 4.
- Joint-tenancy,** 381.
- Joint-tenant, specific performance enforced against,** 971.
- Joint transfer for consideration,** 764.
- 'Judge,'** 94, 95; act of, 115; of High Courts, exempt from criminal jurisdiction, 4, note 1; trading, 153, note 3.
- Judgment,** 112.
- Judgment-creditors,** 794; of trustee, 865; specific performance enforced against, 970, note 2.

- Judicial acts, 115 and note 5.
 Judicial proceeding, giving false evidence in stage of, 166, 167; corruptly making illegal order in a, 179; insulting or interrupting public servant in, 183. *See* Contempt.
 Judicial separation affects wife's domicile, 343.
 Jurisdiction. *See* District Judge, High Courts, Hire, Mámlatdára.
 Juror, 96; personating, 183.
 Jus proliciendi, 897, note 3.
 Just cause, revocation of grant of probate or administration for, 445.
 Justice, offences against public, 164-179.
 'Justice, equity and good conscience,' xvi, xxi.
 Justifiable homicide, 39.
 Justification by law, 116, 117.
 Jute warehouses, 8.

 Kánungós, 97, note.
 Karáchi, mortgage of property in, 782.
 Kat-kobálá. *See* Conditional sale.
 Keys of house, 750.
 Kidnapping, 47, 228, 229, 230, 231; of women for criminal purposes, 37.
 Kindred, defined, 344; degrees of, 345, 346; bequest to, 373.
 Knowledge, of proposer's death or insanity, 550; of impossibility or unlawfulness of agreement, 579; of termination of agency, 635, 636; advancement of, 752; presumed for purpose of election, 759.
 Kulin Bráhma, 229, note 2.

 Labour, unlawful compulsory, 233.
 Labourers, breach of contract by, 63, 64; wages of, 464.
 Laches. *See* Delay.
 Lakes, right to water of, 898.
 Land-holders, lien of, 530.
 Land-improvement Act, 1871, 826.
 Landlord and tenant, 552, note 1.
 Landmark, destroying or moving, 259. *See* Mischief.
 Land-revenue, lien for, 530.
 Lapse of legacy, 307 and note 1, 380, 381, 382.
 Lapse of time, remedies barred by, 506. *See* Limitation.
 Larceny, distinction between 'theft' and, 57, 58.
 Latent ambiguity, 369.
 Latent defects, seller when not responsible for, 608; duty to disclose, 621, 769, 801. *See* Faults.
 Law. *See* Justification, Local law, Mistake, Special law.
 'Lawful act,' 116, note 1.
 Lawful consideration, 552, 559.
 'Lawful guardian,' 239.
 Lawful purpose, 839.
 Lawfulness of matter agreed on, 496.
 Lease, 512, 513, 734, 736; formalities of, 734, 735, 736; renewal of mortgaged, 779, 784; of immovable property, 800-808; of trust property, 855, 860; rescission of contract to take a, 975. *See* Duration, Forfeiture, Holding over, Notice to quit, Surrender.
 Legacies, 306; vesting of, 391-394; specific, 407-410; demonstrative, 411, 412; ademption of, 413-418; to creditors and portioners, 426; when executor must pay or deliver, 470; produce and interest of, 475; chance of obtaining, 748. *See* Bequest, Election, Interest, Investment, Lapse, Refunding.
 Legal character, declarations of, 978.
 Legal curator of property, service on, 799.
 Legal practitioners, 7; their lien on fund decreed to clients, 530; injunction against, 985.
 Legal proceedings, agreements in restraint of, 564.
 'Legal remuneration,' 149-150. *See* Public servant.
 Legal representative, bequest to, 374; signing note, bill or cheque, 683; negotiation by, 692; presentment to, 696, 697. *See* Administrator, Executor.
 Legal tender, 504.
 'Legally bound to do,' 102.
 Legislature, no injunction to prevent persons applying to, 988.
 Legitimate relatives, 377.
 Length. *See* Measure.
 Leonina societas, 520, note 2.
 Lessee, defined, 800; rights of, 735, 802; liabilities of, 736, 803; acquisition of easements by, 900, 907, note 1; of estate under Court of Wards, 749.
 Lessor, defined, 800; rights and liabilities of, 735, 801; rights of transferee of, 804; imposition of easements by, 900.
 Letter, proposal by, 548, 549; acceptance by, 548, 549; property in, 950; injunction to restrain publication of, 987, 988. *See* Post.
 Letters of administration, grant of, 433, 435-438, 455.
 Letting for hire, 509, 512.
 Lex loci rei sitae, 340, 438; of performance, 663, 718, note 1.
 Liability of executor or administrator

- for devastation, 481; of lessee, 803; of lessor, 801; of donee of property subject to obligation, 813; of transferee of debt, 814; of trustees, 848-852; of beneficiary, 866. *See* Duties.
- Libels, injunction to prevent, 938, 988. *See* Defamation.
- Licences, 888, 924-927; to convicts sentenced to penal servitude, 20.
- Lien, 529, 530; of carrier, 515; on goods sold, 601, 602; against subsequent buyer, 602; of agent, 640; of bailee, 626; of bankers, factors, wharfingers, attorneys, and policy-brokers, 626; of pawnee, 627; of agent, 640; for unpaid purchase money, 771 and note 2; of mortgagee on title-deeds, 778, note 2; on share of co-owner for contribution to redemption, 794, note 2; for deposit, interest and costs, 956.
- Lieutenant Governor, assaulting, 137; exempt from power conferred by sec. 45 of Specific Relief Act, 981.
- 'Life,' 103, 221; legacy for, 467.
- Life insurance, 525.
- Light, right to, 885, 897; extent of right to passage of, 912.
- Lighthouse, destroying, 259. *See* Mischiefs.
- Lights, exhibiting false, 197.
- Limitation, for prosecutions, 71; bequest without words of, 374; executor's neglect to sue for debt till debt barred by, 483; remedies barred by, 506; promise to pay debt barred by, 562; of suits on negotiable instruments, 664.
- Limited acceptance, 701.
- Limited grants of probate or administration, 439-446, and *see* Arrangement of Sections, pp. 331-332.
- Limited liability, partnerships with, 655 and note 4.
- Limited purpose, executor for, 441.
- Lineal consanguinity, 344.
- Lineal descendants, 349, 350; bequest to testator's, 382.
- Linen, 760, note 2.
- Liquidated damages, 506, 592, note 3.
- Liquidation of damages not a bar to specific performance, 958.
- Lis pendens, 441, 766, 767, note 1.
- Livery-stable keepers, 514.
- Loan, of stock specifically bequeathed, 418; for consumption, 509, 511; for use, 509, 512, 624; misuse by borrower, 622; where lender shall receive share of profits, 647; of trust-money, 860. *See* Bailment.
- Local custom, 907.
- Local funds, 8.
- Local Government, 342, 456, 488; no injunction to interfere with department of, 988.
- 'Local law,' 102.
- Local laws saved by Penal Code, 8, 9, 10.
- Local usage, 673 and note 3, 726, 797, 800, 801, 884.
- Locke King's Act, 308.
- Locks of house, 750.
- Loss, when buyer must bear, 597; bailee when not responsible for, 622; bailee when responsible for, 624. *See* Wrongful loss.
- Lost bill, cheque or note, 677; holder's right to duplicate, 662, 687, 688; indemnity against claim on, 699.
- Lost instrument of contract, 959, note 1.
- Lost letter of acceptance, 493.
- Lost property, 246. *See* Misappropriation.
- Lost will, probate of contents of, 439.
- Lots, trustee's power to sell in, 855.
- Lotteries, 34, 201, 509, 523.
- Lower Provinces, local laws in, 8, 9.
- Lucid interval, 302, 355 and note 4; contract made in, 553.
- Lunatic, 12, 117, 118, 119, 120; will made by, 302; bequests to, 303; domicile of, 343; *jus habens*, administration for benefit of, 441; probate cannot be granted to, 434; nor administration, 435. *See* Committee.
- Lurking house-trespass, 61, 262, 265, 266. *See* Criminal trespass.
- Machinery, rash or negligent conduct respecting, 199; operation of transfer of, 750.
- Madras Pier, 8.
- Madras Presidency, local laws in, 8.
- Magic, 495.
- Magistrate, 95; defined, 488.
- Maintenance, 560, note.
- Maintenance of minor, 856, 857; bequest with direction as to, 476; transfer of immoveable property subject to charge for, 761; Hindú widow's lien for, 761, note 2.
- Majority, 7; for purpose of making will, 355; and of contracting, 552 and note 3.
- Maker of note, his liability, 683, 684, 685; presentment to charge, 695; estoppels binding, 714.
- Malabar, mortgages in, 731, 775, note 1, 776, note 1.
- 'Malice,' 'maliciously,' 11, 179.
- 'Malignantly,' 11, 146, 195.
- Mámlatdárs, their jurisdiction in case of illegal dispossession, 949, note 1.

- 'Man,' 93.
 Management of mortgaged property, 786.
 Mandamus, bar to issue of, 982.
 Mandate, 624.
 Mandatory injunction, 938, 987.
 Manslaughter, 217, note 2.
 Manufacturing process, injunction to restrain disclosure of, 987.
 Marginal notes, xxii, note 3.
 Marine Court, officers executing warrants of, 97, note.
 Marine insurance, 524, 528.
 Mariner, privileged will of, 360, 361.
 Maritime lien, 530.
 Mark, counterfeiting, 274, 275, 276; of testator, 358; attesting witness not to subscribe by, 358, note 9. *See* Forgery, Government stamp, Land-mark, Mischief, Property-mark, Sea-mark, Trade-mark.
 Market overt, 534, 606, note 5.
 Markets and fairs, 8.
 Marriage, 7, 513, 580, note 1; offences relating to, 34, 230, 272, 281, 282, 283, 284; fraudulently going through ceremony of, 282; interests and powers not acquired, nor lost by, 296, 299, 339, note 6; domicile acquired by, 343; effect on property of, 354; settlements, 354; will when revoked by testator's, 362; suit for breach of promise of, 506; agreement in restraint of, 563; of minor, 856, 857. *See* Adultery, Arbitration, and Arrangement of sections, p. 89; Courtesy, Creditor, Divorce, Dower, Husband, Minor, Partnership, Separation, Wife.
 Marriage-brokerage, 560, note.
 Married executrix or administratrix, 434, 435, 462.
 Married woman, 283, 863, 867; committing crimes in husband's presence, 16; grant of probate to, 434; grant of administration to, 435; trust for separate use of, 861, 862; trustee, 863; contract for sale of her estate, 931. *See* Divorce, Dower, Marriage, Separation, Separate use, Wife.
 Marshalling, assets, 466; securities, 733, 789.
 Master and apprentice, 509, 519.
 Master and servant, 491, 509, 517, 518.
 Material alteration, 502, 663, 701.
 Material part of document, 269 and note 6.
 Maturity of note or bill, 680, 681.
 Maxims—*Volenti non fit injuria*, 14, note 2; *Cessante ratione cessat et ipsa lex*, 304; *Falsa demonstratio non nocet*, 368, note 1; *Qui tacet satis loquitur*, 398, note 4; *Qui facit per alium, facit per se*, 498, note 2; *Nulla promissio potest consistere quae ex voluntate promittentis statum capit*, 503, note 3; *Caveat emptor*, 607, note 1; There is no contribution between wrong-doers, 611, note 3.
 Meaning. *See* Construction, Interpretation.
 Measure of damages, 683, notes 4 and 7; for wrongful dismissal, 518, note 1; for breach of contract to admit to partnership, 522; in case of dishonour of note, bill, or cheque, 712. *See* Compensation.
 Measures, offences relating to, 193. *See* Weights.
 Medals, 185, note 1.
 Medical men, preferential payment of fees of, 464; their contracts for professional service, 516; injunction against, 985.
 Medical practice, agreement for sale of, 958, note 7.
 Members of Council, exempt from criminal jurisdiction, 4, note 1, 153, note 3; assault on, 137.
 Mental distress, undue influence in case of enfeblement by, 554.
 Mercantile usage. *See* Usage of trade.
 Merchant, criminal breach of trust by, 249; domicile of, 341.
 Merchant seamen, 7, 552, note 1.
 Merchant shipping, 7.
 Merger, of right of action on obligation resulting from decree, 506, 508; of right of action on bill, 508, 702; of charges, 508, 798 and note 3; of interests of lessee and lessor, 806; extinction of easement by, 886, 920.
 Military crimes, abetment of, 28, 140, 141.
 Military men, domicile of, 341. *See* Army, Articles of War, Mutiny, Soldier.
 Military testaments, 360, 361.
 Mines, which lessee must not work, 804.
 Mines and minerals, 727 and note 1.
 Minor, 338 and note 3, 863; bequests to, 303; domicile of, 343; marriage settlement of, 354; cannot make will, 355, 360; except to appoint testamentary guardian, 366; probate not granted to, 434; nor administration, 435; legacy to, 473; cannot contract, 552; agreement in restraint of marriage of, 563; supply of necessities to, 585; partner, 648, 649; his power to draw etc.

- notes, bills and cheques, 682; accepting property burdened by obligation, 812; creation of trust by, 825, 841; trustees for, 827; power to apply trust-property for maintenance etc. of, 856, 857; trustee, 863.
- Minority, 338 and note 3, 552, note 3; administration during, 440, 441, 462.
- Mints, persons employed in causing coin to be of illegal weight or composition, 187, 188; taking coining-tools from, 188. *See* Coin.
- Misapprehension, 972 and note 6.
- Misappropriation of moveable property, 245, 246, 247.
- Miscarriage, causing, 213, 214, 215.
- Mischief, 60, 255-260; in respect of certain documents, 275. *See* Private defence.
- Misconduct of partner, 652, note 9; of applicant for injunction, 989.
- Misdescription, of legatee, 366, 367; of subject of contract, 955, note 2; condition for compensation for, 974, note 6.
- Misfortune, 116.
- Misnomer, 366, 367.
- Misprision of treason, 136, note 4.
- Misrepresentation, 494, 555; defined, 556; consent caused by, 971; guarantee obtained by, 618; by agent, 646; by prior mortgagee, 788.
- Mistake, in negotiable instrument, correction of, 701.
- Mistake of fact, 115, 122, 556, 557, 558, 972; causing death by, 207; of law, 558; liability of person to whom money paid or thing delivered by, 586; defence by purchaser on ground of, 962, note 5; rescission of contract for, 976.
- Mixture of goods not ordered with goods ordered, 610; of bailor's goods with bailee's, 623.
- Modesty, insult to woman's, 292.
- Money, 184, note 2, 370, note 2; includes bank-notes etc., 370; note or bill must be payable in, 675, 676; incidents of, 750; warranty on exchange of, 531, 809. *See* Coin, Ready money.
- * Month, 103, 338, 487, 680.
- Mopla (Mápillá) Outrages, 8.
- Moral considerations, expressions involving, 11.
- Morality, 232, note 3, 398, 496.
- Mortgage, 509, 528, 731-734; defined, 774; by executor or administrator, 461 and note 3; by deposit of title-deeds, 732; by lessee, 803; of debt, 815; of trust-property, 860. *See* Lease, Management.
- Mortgage-money, defined, 774; when mortgagee may sue for, 781.
- Mortgagee, rights of, 732, 733; liabilities of, 733; his right to sue for the mortgage money, 781; in possession, 784; liabilities of, 786; right of subsequent to pay off prior, 785, 786; other rights of mesne, 786; powers of, 817. *See* Interest, Misrepresentation.
- Mortgagor, rights of, 732; implied contracts of, 732; implied contracts by, 779; imposition of easement by, 900.
- Mortmain, 303; Mortmain Acts, 727, 825.
- Mother, her right to intestate's property, 351, 352; may appoint testamentary guardian, 356, 1032; her right to administer, 438.
- 'Motive for doing,' 150.
- 'Moveable property,' 97, 488; succession to, 340; combined with immoveable property, agreement for sale of, 597; suit for possession of, 950. *See* Goods.
- Muhammadan, 482; will of, 310; administration to intestate, 315-321; Succession Act does not apply to, 483.
- Muhammadan, marriages, registrars of, 97, note; law, 496, note 1, 530, note 10; saved, 747, 812; gifts, 812 note 3. *See* Shia law, Waqf.
- Mukhtars, their incapacity to buy actionable claims, 814; suspension and dismissal of, 1031.
- Mule, killing etc., 258. *See* Mischief.
- Multiplicity of suits, 978; injunction to prevent, 938, 984, 986, note 4, 988.
- Municipal commissioners, 96, note 3, 97.
- Municipal funds, 816, note 1.
- Municipalities, 8, 9, 10, 552, note 1, 940.
- Murder, 205, 206, 207, 209, 210, 244; when culpable homicide is not, 207-209; by dacoits, 244; discharge of contracts by, 508. *See* Culpable homicide, Dacoity, Suicide.
- Mutiny, abetting, 140; circulating rumours with intent to excite, 291. *See* Insubordination.
- Mutiny Act, 6. *See* Articles of war.
- Mutual mistake, 973.
- Mutuality in case of specific performance, 931.
- Mysore, 298.
- Native Christians, xxi; their law of succession, 295, note 5.

- Native officers of Courts, 9.
 Native Passenger Ships, 7.
 Native States, borrowing from or lending to, 28; railways in, 298.
 Nātrā marriages, 282, note, 283, notes 3 and 7.
 Natural affection, agreements on account of, 552, note 1, 562.
 Natural rights, 881, 896.
 Natural stream, 898.
 Navigable river or channel, injury to, 258.
 Navigation, rash or negligent, 197; obstructing, 198. *See* Buoy, Light-house, Mischief, Sea-mark.
 Navy, offences relating to, 28, 139-142, and *see* Arrangement of sections, p. 78.
 Nazrānda, lien for, 530.
 'Nearest of kin,' 'Nearest relations,' bequest to, 373.
 Necessaries, 533, 585 and note 2.
 Necessary expenses, in case of gratuitous bailment, 624; pawnee's lien for, 627.
 Necessity, easements of, 882, 900, 901, 902; extent of easement of, 912; extinction of easement of, 919.
 Necessity of sale by vendor, 959, note 3.
 Need. *See* Drawee in case of need.
 Negative agreement, injunction to perform, 938, 989, 990.
 Negative easements, 881.
 Negative service, contract for, 509, 523. *See* Negative agreement.
 Neglect of promisee to facilitate performance, 584.
 Negligence, 12, note 1, 67; in keeping State prisoners or prisoners of war, 28; causing death by, 43; evidence of, 139, note 3; of executor or administrator in getting in assets, 481; of bailee, 622; of agent, 637; of principal, 641; of co-partner, 649; in paying note, bill or cheque, 678.
 'Negligent,' 'negligently,' 11, 139, 180, 197, 198, 199, 211.
 Negotiable bonds, 659 and note 1.
 Negotiable instruments, 296, 499; defined, 678. *See* Bills of exchange, Cheques, Promissory notes.
 Negotiable Instruments Act, 673-725; Introduction to, 659-665.
 'Negotiation,' defined, 678; rules as to, 689-693.
 Negotiorum gestor, 533.
 'Nephews,' 376; their right to intestate's property, 351, 352.
 New trustees, appointment of, 868, 869; vesting of trust property in, 870; powers of, 870.
 New Year's Day, 681.
 Next of kin, bequest to, 373.
 'Nieces,' 376; their right to intestate's property, 351, 352.
 Noise, right to freedom from, 897; injunction to restrain making, 986.
 Non-acceptance, dishonour by, 703.
 Non-attendance in obedience to order from public servant, 156.
 Non-enjoyment of easement, 886, 921.
 Non-existing goods, 598.
 Non-gratuitous act, obligation of person enjoying benefit of, 586.
 Non-payment, dishonour by, 703.
 Non-user, 886.
 North-Western Provinces, local laws in, 9.
 Notaries public, 664, 674, and note 2, 706, 707; power to appoint, 720; fees to be charged by, 725.
 Note. *See* Promissory note.
 Notice, to executor, 478; of discharge to company's servants, 517; defined, 747, 838; of seller's claim, 604; of revocation or renunciation of agency, 635; to agent, 643; of agreement restraining power of partner, 649; of dissolution of partnership, 655 and note 2; to holder of note etc., 677-8; of dishonour, 683, 703-705, when unnecessary, 704; reasonable time for giving, 709; of qualified acceptance, 701; of protest, 707; of defects in property leased, 736; before sale by mortgages, 782, 817; to quit, 800 and note 3, 806 and note 9; to lessor of encroachments on property leased, 803, 804; to determine lease, 806; of transfer of debts, 813; of intention to abandon or suspend easement, 887, 922; of contract to buy, 946; of occupation of third person, 947; of settlement, 966. *See* Contempt, Court of justice, Distribution, Owner, Service, Waiver.
 Noting, 706; when equivalent to protest, 708.
 Novation, 581, 582.
 Nudum pactum, 516, 562.
 Nuisance, 33; public, 194, 195; no injunction to prevent certain acts on ground of nuisance, 989. *See* Atmosphere, Disease, Drugs, Food, Reservoir, Spring.
 Number, 93, 487.
 Nuncupative wills, of Hinddās, 311; of soldiers and mariners, 360, 361.
 'Oath,' 103, 489; public servants authorised to administer, 158, note 6; persons bound to make, 159, note;

- refusing to take, 158, 159. *See* District Judge, False evidence.
- Object of agreement, when lawful, 559.
- Obligation, 395, note 2; apportionment of, 760; restricting use of land, 762; annexed to ownership of land, 762; defined, 946; in the nature of a trust, 872-878; incurred by partnership, 649. *See* Minor.
- Obliteration in will, 364.
- Obscene books, drawings, etc., selling, importing, printing, and possessing, 200 and note 6, 201; songs, 201.
- Obscenity, 34, 200, 201. *See* Insult.
- Obstructing fairways, 7; a door, 53; public sale of property, 160, 161; public servant, 161, 181; public way, 198; road, bridge, or river, 258; excessive user of easement, 884, 914. *See* Mischief, Public servant, Resistance.
- Occupancy, tenant with untransferable right of, 749.
- Occupier of land on which unlawful assembly is held, 146, 147.
- 'Offence,' defined, 111, 102 and note 2; made up of several offences, 111; falling within two or more definitions, 112. *See* General exceptions, Private defence, Unnatural offences.
- Offensive weapons in Malabar, 8.
- Offer of performance, 570, 571.
- Office, requiring residence, when domicile not conferred by, 341, 342; priestly, 748; inalienability of public, 749; declaration of right to continue in, 979, note 8.
- Officer. *See* Assault, Commissioned officer, Domicile, Insubordination, Mutiny, Punishment.
- Officers of Courts trading, 153, note 3.
- Official liquidator, administration by, 306.
- Official secrets, 28.
- Official trustee, 474, 860.
- Officials wilfully disobeying orders of Secretary of State, 30.
- Old age, undue influence when mind enfeebled by, 554.
- 'Omission,' 100; to apprehend, 179, 180, 182; to give notice or information to public servant, 157; to give information of offence, 170; to produce document to public servant, 156, 157; to assist public servant, 161, 162; fraudulent, 555; supplied from context of will, 367. *See* Agent, Document, Evidence, Owner, Public servant, Riot.
- 'On presentment,' 680.
- Onerous bequest, 395; gift, 811, 812.
- Onus probandi. *See* Evidence.
- 'Openly,' 904, note 8.
- Operation of contract, 498.
- Operation of law, assignment by, 499, 500; discharge of contracts by, 508.
- Opinion of Court, trustee's right to apply for, 854.
- Opium, 7.
- Option, 809; of transferee, 763; of person defrauded by transfer, 767; to determine lease, 805.
- Oral guarantee, 527; ratification, 532; account stated, 532; transfer, 750; imposition of easement, 882; agreement relating to land, 932; agreement for reconveyance, 969, note 1.
- Order, for delivery, 605, 628; to drawee of bill, 676; absolute for foreclosure, 792; for sale, 793.
- Order of performance of reciprocal promises, 577; of indorsements, presumption as to, 713.
- Oriental language, instrument in, 673. *See* Hindi.
- Origin, domicile of, 340, 341.
- Ostensible owner, transfer of immovable property by, 762.
- Oudh, local laws in, 9.
- Oudh taluqdárs, intestate succession to, 301, 303.
- Overdue bill or note, acceptor of, 684; indorser of, 684; negotiation of, 693.
- Owely of exchange, 809, note 1.
- Owner of goods, sale by possessor with consent of, 605.
- Owner of land on or respecting which riot takes place, 146, 147.
- Ownership, violation of rights of, 54.
- Ox, killing, &c., 258. *See* Mischief.
- Pancháyat, 95; member of, 96.
- Panjáb, local laws in, 9; mortgages in, 1034.
- Paper currency, 7, 660.
- Parole, state prisoner or prisoner of war at large on, 139.
- Pársis, 353, 840, note 3; law relating to, xxi, 295 and note 4, 298, 301, 1032; wills of, 303.
- Part-delivery, 594, 600.
- Part-payment, 594.
- Part-performance, 959, note 1.
- Partial acceptance, 701; indorsement, 692.
- Participation, 1, 64.
- Particular knowledge or intent, offence requiring, 117-118.
- Parties, to notes, bills, and cheques, 682-688; to suits relating to mortgages, 791.

- Partition, creation of easements on a, 901; of dominant heritage, 913.
- Partner, marriage of spinster, 296; agreement in restraint of trade, 564; responsibility of person leading another to believe him a, 648; minor, 647, 648; liabilities of, 649; power to bind co-partners, 649; mutual relations of, 650, 651; duties of, 653; accounts of, 654; injunction against, 985; restraining defendant from holding out plaintiff as his, 987. *See* Good-will, Lender, Minor, Notice, Servant, Widow, Winding-up.
- Partnership, 509, 647, 801, note 4; contract of, 520-522, 650; annulment of contract of, 650; dissolution of, 296, 652, 653; subsequent rights and obligations, 653; wrongful employment by partner-trustee of trust property for purposes of, 866. *See* Profit.
- Parts of sets of bills, 717.
- Passengers in ships, 7.
- Pasturage, rights of, 879.
- Patent, specific performance of contract for sale of, 953, note 2; injunction to restrain infringement of, 986 and note 9.
- Patent ambiguity, 369.
- Patwáris, 97, note.
- Pawn, 528.
- Pawnbrokers, 529.
- Pawnee, pledging or converting goods pledged, 529; defined, 626; his rights, 528, 627.
- Pawnor, 626; his right to redeem, 627.
- 'Payee,' defined, 677; certainty as to, 676.
- Payment, of liabilities in respect of thing bequeathed, 419-421; discharge by, 503; by mistake or under coercion, 586; in due course, defined, 678; presentment for, 695; of amount due on note, etc., 698; when discharge, 700, 702; for honour, 711; into Court of mortgage-debt, 733, 734; by leasee of money which lessor is bound to pay, 802; or tender of, 803. *See* Appropriation.
- Peace, provoking to breach of, 291. *See* Affray, Riot.
- Pegu and Sittang Canal, 10.
- Penal Code, 91-292; Introduction to, 1-72; its arrangement criticised, 1; its history, 71, 72.
- Penal law, specific relief not granted to enforce, 948.
- Penal servitude, 7, 20, 25, 108.
- Penalty and liquidated damages, 592, note 3.
- Pendente lite, administration, 441; transfer, 766.
- Pensions, inalienability of, 749.
- Performance, discharge by, 503; of conditions of proposal, 550; of contracts, 570-584. *See* Neglect, Specific performance.
- Periodical payments, apportionment of, 760.
- Perishable, goods may be sold by finder, 625; trust property, conversion of, 845, 846.
- Perjury, *see* False evidence; subornation of, *see* Abetment.
- Perpetual injunctions, 937, 983-990.
- Perpetuities, rule against, 307, 312, 387, 752. *See* Public.
- 'Person,' 92, 94, 487.
- Personal, interest, injunction not granted in absence of, 989; law, 828, 831, 863; qualifications, contract dependent on, 958; right, 981.
- 'Personal representatives,' bequest to, 374; to A and his, 376.
- Personation, of soldier, 142; for purpose of proceeding in suit, 171 and note 9; of public servant, 153, 154; of jurors or assessors, 183; cheating by, 253.
- Petition for probate, 450; for letters of administration, 451, 452; to be discharged from trust, 868.
- Petroleum, 7.
- Pice, when legal tender, 504.
- Pictures, defamatory, 48.
- Piracy of copyright, injunction to restrain, 986; of designation of manufacture, 989.
- Place for performance of promise, 575. *See* Presentment.
- Plate, counterfeiting a, 273; making or possessing counterfeit, 273-4; silver, 370, note 2. *See* Forgery, Government stamp, Trade-mark, Valuable security.
- Plate, for winner of horserace, 566.
- Pleaders, to subscribe petitions for probate or administration, 452; their contracts for professional service, 516; their incapacity to buy actionable claims, 814; suspension or dismissal of, 1031.
- Pledge, 626; by possessor of documentary title to goods, 628; where pawnor has only a limited interest, 628. *See* Pawn, Pawnee, Pawnor.
- Poison, 8; causing hurt by, 218. *See* Drug.
- Poisonous substance, rashness or negligence respecting, 198.
- Police, 7, 8, 9, 10.

- Police officers trading, 153, note 3.
 Policies, of marine and fire insurance, assignments of, 499; suits on, 525; cancellation of, 977.
 Policy. *See* Public policy.
 Policy-brokers, lien of, 626.
 Policy-moneys, transferee's right to, 765; application of, by mortgagee in possession, 787.
 Polluting air, extent of prescriptive right of, 913; injunction to restrain, 986 and note 7.
 Pollution of water, 905; extent of prescriptive right of, 913.
 Polyandry, 281, note 3.
 Ponds, right to water of, 898.
 Port-commissioners, 552, note 1; at Rangoon, 97, note.
 Portioners, legacies to, 426.
 Ports, 7.
 Possession, proposed definition of, 56, 57, and see 235, notes 4, 5, 431, 605, 628, note 2; violation of rights of, 54; of wife, clerk, or servant, 98; of seller, contract for sale of goods not in, 598; delivery effected by putting buyer in, 599; sale of goods by person in, by owner's consent, 605; to be given to buyer of immoveable property, 769; when usufructuary mortgagor entitled to, 777; mortgagor redeeming entitled to, 795; lessee entitled to, 801; lessor on determination of lease, 802; juridical, 949, note 1. *See* Prescription.
 Possibility, of matter agreed on, 495; not transferable, 748.
 Post, acceptance of proposal by, 549. *See* Rent.
 Post office, 7; not liable for loss, 516.
 Posthumous child, domicile of origin of, 340; grandchild, 349.
 Postponement, of election, 430, 759; of payment or delivery, 594; of prior mortgagee, 788; of day appointed for payment of mortgage money, 792, 796.
 Pound-keepers, 97, note.
 Power, of appointment, will made in exercise of, 362, 363; will operating as execution of, 372, 373; of sale, 320, note 1, 461, note 3; mortgagee's, 782, 783, 817; to sell trust property, 855; to revoke transfer of immoveable property, transfer by person having, 763. *See* Lapse, Rules.
 Power of attorney, 519; service on person holding general, 798.
 Powers, of executors and administrators, 460-462; of mortgagees, 782, 817; of trustees, 855-858.
 Practice, in granting and revoking probate and administration, 447-457; in mandamus, 982.
 Prayopaveçana, 53.
 Preambles, xxii and note 4.
 Precatory trusts, 840, note 4.
 Preferential right of executor, 304; of shipmaster, 524. *See* Wages.
 Pregnant woman, 19.
 Premature applications for injunctions, 989, note 9.
 Premium, 524; defined, 800; payment or tender of, 803.
 Prescription, 71; acquisition of easements by, 882, 883, 904; rights which cannot be acquired by, 906, 907; extinctive, 886, 921.
 Presentment for acceptance, 694; drawee's time for deliberation, 695, 700; when drawee has no fixed residence, 696; or is dead or insolvent, 696-7; reasonable time for, 709.
 Presentment for payment, 695; during what hours, 695; of note etc. payable by instalments, 696; of instrument payable at specified place, 696; where maker etc. has no fixed place of residence, 696; of cheque, 696; of instrument payable on demand, 696; where drawee etc. is dead or insolvent, 696, 697; when unnecessary, 697 and note 4; in case of lost bill, 699; reasonable time for, 709.
 Presentment for sight, 694-5.
 'Presidency,' 94.
 Presidency Banks, 552, note 1; powers of officers of, 664.
 Presidency towns, mortgage of property in, 782.
 Presumptions, as to knowledge or waiver in case of election, 430, 759; as to contract binding agent, 643; as to negotiable instruments, 663, 664, 713, 714; as to foreign law regarding notes, bills, and cheques, 719; that transfer was made with intent to defraud, 767; as to advantages gained by trustees from their beneficiaries, 832; in case of breach of contract to transfer property, 952. *See* Date, Holder.
 Presumptive heir, 978, note 1.
 Pretence. *See* Cheating.
 Pretended biddings, 610, 963, note 5.
 Pretium affectionis, 951, note 3.
 Prevarication by witness, 183.
 Preventing service or publication of summons, 155; event on which contract is to take effect, 577.
 Preventive relief, 948.
 Previous convictions, 113, 114, note 4.

- Price of goods, ascertaining amount of, 596; by the Court, 599.
- Price of work, summary decision in disputes as to, 517.
- Principal and abettor. *See* Abetment.
- Principal and agent, defined, 629; who may be principal, 629; ratification by, 632, 633; revocation by, 634, 635; liabilities of, 641, 642, 646, 1033. *See* Agency, Agent.
- Principal and surety, 573; parties to bills etc. in relation of, 684, 685.
- Principal contracts, 509.
- Principal debtor, 612.
- Printing, defamatory matter, 52, 289. *See* Defamation, Obscenity.
- Prior disposition not affected by invalidity of ulterior, 756.
- Prior parties to negotiable instrument, liability of, 684.
- Priority of rights created by transfer, 765; of mortgagee, 788.
- Prisons, 9, 10.
- Prisoners, 7; of war, 138, 139; wills of, 356. *See* Parole, Rescue, State prisoners.
- Privacy, easement to restrain interference with, 881; rights of, 907, note 4.
- Private defence, right of, 17, 122-126, 208.
- Privileged wills, 302, 360.
- Prizes, public offer of, 493, note 2; taken in war, 823 and note 2, 838.
- Probate, 339; grant of, 433-435; necessity of, 435; effect of, 435; of copy of lost or withheld will, 439; of contents of lost will, 439; limited, 441; with exception, 443; of the rest, 444; amending or revoking grant of, 445; practice in granting or revoking, 447-457; conclusiveness of, 449; form of grant of, 454. *See* Caveat.
- Probate and Administration Act, 1881, 317-321.
- Procedure in suits on negotiable instruments, 664; in suits between mortgagor and mortgagee, 734; in the enforcement of public duties, 982 and note 3. *See* Civil Procedure Code.
- 'Proceedings,' 490 and note 2.
- Produce, of fund, bequest of, 453; of legacies, 475; of residuary fund, 475-6.
- Production, of testamentary papers, 447; of bill etc. when payment demanded, 699.
- Profession, effect on domicile of residence in exercise of, 341; agreement in restraint of, 563-4.
- Professional service, 509, 516.
- Profit, on resale, 605; from goods bailed, 624; agent must account for, 637; partnership implies expectation of, 653, note 1; trustee not to use trust funds for his own, 860; when co-partner trustee of, 946.
- Profits à prendre, 880.
- Prohibition of partnership-business, 653 and note 2.
- Promise, 546; express or implied, 551; to compensate for something done for promisor, 564; to pay time-barred debt, 564; refusal or disability to perform, 571; employing competent person to perform, 572; accepting performance from third person, 572; joint-promise, 572-3; time and place for performing, 575; reciprocal, 576-578; to do impossible or unlawful act, 579; alternative, 580; remitting performance of, 582.
- Promisee, 546; when he can end contract, 571; accepting performance from third person, 572; his right against joint promisors, 572-3; neglecting to afford promisor reasonable facilities, 584; in a contract of indemnity, 611.
- Promisor, 546; representatives of, 570; refusing to perform, 571; excused by promisee's neglect to give facilities to, 584. *See* Joint promise.
- Promissory note, 509; defined, 675; custom of shroffs as to, 674, note; holder of, 677; negotiation of, 678; when payable on demand, 660, 679; maturity of, 680, 681; presentment for sight of, 694; presentment for payment of, 695. *See* Inchoate stamped instruments, Maker, Negotiable instrument.
- Promoters of company, extravagant contract by, 962; specific performance of contract by, 966, 970.
- 'Proper care and caution,' 116, note 2.
- Proper time and place, 575.
- Property, offences against, 53, 235-267, and *see* Arrangement of sections, pp. 85-87; public servant unlawfully buying or bidding for, 153; protection of deceased's, 448; general transferability of, 748; who may transfer, 749; operation of transfer of, 750. *See* Formalities, Goods, Immoveable property, Transfer.
- Property-mark, 275-278, and *see* Arrangement of sections, p. 88; counterfeiting, 62, 276; removing or defacing, 278. *See* Counterfeiting, Forgery, Mark, Trade-mark,

- Proposal, 493, 546. *See* Acceptance.
 Proposer, death or insanity of, 550.
 Prosecution with intent to injure, 173.
 Prostitution, selling or buying minors for purposes of, 232; recognised by Hindú law, 496.
 Protection of property of deceased, 448.
 Protest, 706-708, 711; when notary's services cannot be obtained, 663. *See* Drawee in case of need.
 Province, 338 and note 2. *See* Probate.
 Provisions, implied warranty on sale of, 607. *See* Food.
 Provocation, 207, 220, 221, 226, 227, 228. *See* Insult, Riot.
 Proxy, appointment of, 859.
 'Public,' 94; abetting commission of offence by, 133; transfer in perpetuity for benefit of, 752.
 Public charges, seller's duty to pay, 769; payable by buyer, 771; payable by mortgagor, 779.
 Public convenience, 194, 197.
 Public curator, 860.
 Public decency and morals, 34; offences affecting, 200, 201; and see Arrangement of Sections, p. 82.
 Public duties, bond for performance of, 592; enforcement of, 980-982.
 Public entertainment, transfer of license to attend place of, 924.
 Public functionaries, injunctions to restrain acts of, 987, note 6.
 Public good, imputations made for, 286.
 Public health, 33; offences affecting, 194-197; and see Arrangement of sections, p. 82.
 Public holidays, 681, 709.
 Public justice, offences against, 30, 171-183; and see Arrangement of sections, pp. 80, 81. *See* False evidence, Public servant.
 Public morals, offences affecting, 200, 201.
 'Public nuisance,' 194, 200.
 Public office not transferable, 749.
 Public performance, opinion respecting merits of, 287.
 Public policy, 559, note 4.
 Public question, opinion respecting conduct touching, 286.
 Public safety, 33; offences affecting, 197-199.
 'Public servant,' 7, 95, 96 and notes, 123, 1032; offences by or relating to, 29, 149-163; and see Arrangement of sections, p. 79; wearing garb or carrying token resembling one used by, 154; authorised to administer oaths, 158, note 6; criminal breach of trust by, 249; opinion respecting conduct of, 286. *See* Abetment, Affray, Assault, Bribe, Concealment, Escape, Framing incorrect document, Gift, Gratification, Personation, Riot, Salary, Trade.
 Public tranquillity, 28, 29; offences against, 143-148; and see Arrangement of sections, pp. 78, 79.
 Public transfer, 729, 739.
 Public way, causing injury or obstruction to person in, 197, 198.
 Publication, of summons, 155; of papers or letters, injunction to restrain, 985, 987, 988.
 Puffers, 610 and note 2, 963.
 Punishment, theories of, 26.
 Punishments, 104-114, and see Arrangement of sections, pp. 75, 76; under Penal Code, 18; classified list of, 25, 26; for making false averments in petitions etc. and in Succession Act, 452.
 Purchase by executor or administrator of deceased's property, 461.
 Purchase-money, payment or tender of, 771; application of, after sale under power, 783, 818. *See* Price.
 Purity of water, right to, 897.
 Qualifications, contract depending on personal, 958.
 Qualified acceptance, 701; indorsement, 690, 691.
 Qualified owner, advantage gained by, 876.
 Quality, warranty of, 531.
 Quarantine, 7; rules, disobeying, 195.
 Quarries, which lessee must not work, 804.
 Quasi-contracts, 533, 534, 585-587, 1033; damages for failure to discharge obligation, created by, 588.
 Quasi-easements, 901.
 Quasi-trusts, 830.
 'Queen,' 94; waging war against, 136.
 'Queen's coin,' 184. *See* Coin.
 Questions, refusal to answer, 159; which seller must answer, 769.
 Quieting title, 935.
 Quiritarian ownership, 821, note 1.
 Quitrents, lien for, 530.
 Quorum of executors, 462.
 Railway companies, 552, note 1; bailments to, 515, 662, note 3. *See* Cloak-rooms, Shares, Time-tables.
 Railways, 3, note 1, 7; in Native territory, 3, note 1, 298; mortgage of, 781. *See* Receiver.
 Railway servants, 97, note.

- Rainwater, 895, note 4.
 Rāj, when inalienable, 749, note.
 Rājputāna Agency, 298.
 Rājputa, age of marriage amongst, 37, note 5.
 Rangoon, waterworks, 10; mortgage of property in, 782. *See* Recorder.
 Rape, 47, 233, 234; attempt to commit, 293, note 4.
 'Raah,' 'rashly,' rashness, 11, 12, 197, 211, 221.
 Raah driving, riding, and navigation in public way, 197.
 Rashness, as to poisonous substance, 128; endangering human life, or personal safety of others, 221.
 Ratification, 509, 531, 532; of agent's act, 632, 633.
 Ready money, includes balance at banker's, 370, note 2.
 Recallast, 895, note 6, 911, note 4.
 'Reason to believe,' 98.
 Reasonable compensation, 592, note 3.
 Reasonable construction, 371.
 Reasonable misapprehension, 968, note 6.
 Reasonable opportunity of inspection, 571 and note 3.
 Reasonable price, 599.
 Reasonable time, carrier must deliver within, 515; engagement to be performed within, 575; for presentment, giving notice of dishonour, and noting, 709.
 Receipt, for purchase-money, 817; co-trustee joining in, 851; in full, 854, note 5; trustee's power to give, 857.
 Receipts from mortgaged property in lieu of interest, 788.
 Receiver, 817, 819, 863, note 4; of profits of railway, canal, etc., 781, note 5; appointment of, 936, 980.
 Receiving property taken by war or depredation on friendly power, 138; stolen goods, 59, 250, 251.
 Reciprocal promises, 547; performance of, 576, 577, 578, 580.
 Réclusion, 44, note 1.
 Recognizances, putting under, 18, 592.
 Record, framing incorrect, 153; of Court, forgery of, 272; contract of, 506.
 Recorder of Rangoon, 339.
 Recoupment of trustee for erroneous over-payment, 853.
 Rectification of instruments, 973, 974.
 Re-delivery to bailor without title, 625.
 Redemption, right of, in case of pledge of goods, 627; in case of mortgage of immoveable property, 776, 777 and note 1; suit for, 776; parties to suit for, 791; who may sue for, 794; purchaser's right to compel, 956. *See* Deposit, Foreclosure, Tender.
 Redraft, 712.
 Re-entry, right of, 748.
 Re-exchange, 712.
 Referee in case of need, *see* Drawee in case of need.
 Reference, to arbitration, 565. *See* Incorporation.
 Reformatory, schools, 7, 18, 519; settlements, 18.
 Refunding of legacies, when executor may require, 478-480.
 Refusal to answer public servant, 159; to sign statement when required by public servant, 159; to take oath or affirmation, 158, 159; to accept offer of performance, 570; to perform promise in its entirety, 571; of promisee to facilitate performance, 584; to accept where goods not ordered are sent with goods ordered, 610; of one of several donees, 811.
 Regimental necessities, 8, 142, note 2.
 Register of birth, etc., forgery of, 272.
 'Registered,' defined, 747, 768, 775, 801.
 Registered letter, presentment by means of, 662.
 Registering officers, 97, note.
 Registration, of documents, 7; of births and deaths, 9; of agreement made on account of natural affection, 562; of instruments of sale, 768, mortgage, 775, and lease, 801; of declaration of intention to retain discontinuous easement, 886, 921.
 Registration Act, 519, note 7.
 Registration-office, 976; officers, 97, note.
 Reimbursement, of person paying money due by another, 585; of expenses, trustee's right to, 852 and note 2.
 Rejection, of erroneous parts of description, 367, 368; of part of will, 371.
 Relapse, 24.
 Relations, bequest to, 373.
 Release, dishonest, 255; of debt due to deceased, 271; discharge by, 506; of one joint promisor, 574; of principal debtor, 615; of one co-surety, 616; of maker, acceptor, or indorser, 700; of easements, 885; extinction of easements by, 917, 918.
 Relief against forfeiture for non-payment of rent, 736.
 Religion, 202, 203; advancement of, 752.
 Religious assembly, disturbing, 202.

- Religious endowments, 823 and note, of Natives not transferable, 747, note 2, 748, note 1.
- Religious feeling, offences relating to, 32, 203.
- Religious hallucination, 117, note.
- Religious uses, bequest to, 390.
- Religious worship, minor's, 856, 857.
- Remainderman, specific performance enforced by, 965; against, 971.
- Re-marriage, during lifetime of husband or wife, 281; of widow, does not exclude her from administering, 437.
- Remission of performance of promise, 582 and note 4.
- Remote damage, 505, 588.
- Remoter parties to bill etc., 687.
- Remoteness, rule against, 387, 388, 389.
- Removal of prisoners, 21; of stamp from document, 191; of thing specifically bequeathed, 416.
- Remuneration, agent's right to, 639; not to partner for acting in partnership business, 651; for trustee's services, 860; of constructive trustee, 878.
- Renewal, of mortgaged lease, 779, 784, 946; of lease of trust-property, covenant for, 961.
- Rent, defined, 800; seller's duty to pay, 769; remitting through post, 803, note 6.
- Rents, bequest of, 423; collecting arrears of deceased's, 464; and profits, 750; of mortgaged property, 786; beneficiary's right to, 861.
- Renunciation by executor, 436; of agent's authority, 634, 635; of lessee's character as such, 806; of beneficial interest, 841; of trust, 859.
- Repairs, by lessee, 735; of mortgaged property, 787: of property leased, 802, 803; allowance for, 975, note 5; necessary for preserving easement, 911; trustee's power to make, 855 and note 1.
- Repeal, matters done under enactment before, 490.
- Repetition of words in different parts in same will, 371; of legacies, 378.
- Repledging goods, 529.
- Reports of proceedings of Courts, 286.
- Representatives, bequest to, 374; bequest to A and his, 376; of promisors, 570; of pawnor and pawnee, 627, note 6; specific performance enforced against, 971. *See* Administrator, Executor, Heir.
- Reputation, forgery for purpose of harming, 273; of legitimacy, 377. *See* Defamation, Libel.
- Re-sale of goods on buyer's failure to perform, 605.
- Rescission, of contract by agreement of parties, 581; of voidable contract, 583, 584; compensation in case of rightful, 593; of contract of sale of goods, 610; of contracts in writing, 974-976.
- Rescripts, imperial, xxvi.
- Rescue of prisoners, 181, 182, note 1; of state or war, 139. *See* Escape, Harbours.
- Reservoir, fouling water of public, 196, injuring, 258.
- Residuary legatee, 379, 380, 425, 480; grant of administration with will annexed to, 436; when security given by, 472; entitled to produce of residuary fund, 475; surplus payable to, 480.
- Residue, includes property ineffectually appointed, 379-380; lapse of part of, 381; bequest of, enumerating certain articles, 410; conversion and investment of, 473.
- Resistance, to taking property by lawful authority, 160; to lawful apprehension, 181, 182.
- Respondentia, 491, 509, 524.
- Rest, grants of the, 444.
- Restoration of goods bailed gratuitously, 624.
- Restraint, wrongful, 221, 222; of marriage, 563; of trade, agreement in, 523, 563, 564; of legal proceedings, 564.
- Restriction, repugnant to interest created, 751; on use of land, burden of obligation imposing, 762; not favoured by law, 884; useless, 886.
- Rests, taking accounts with, 788, note 1, 849.
- Resulting trusts, 830, 831.
- Retainer, executor has no right of, 465, 466-7; agent's right of, 639; out of purchase-money of amount of encumbrances, 771.
- Retention of property, 98.
- Retirement from partnership, 652, 1034.
- Re-transfer, of negotiable instrument, 691-2; of mortgaged property, 795.
- Return of goods bailed, 624.
- Revenue, payment of government, 786. *See* Farmer.
- Revenue-authorities, transfer by, 770, note 3.
- Revenue-officers trading, 153, note 3.
- Revenue-sale, charge on proceeds of, 785.

- Reversioner, of servient heritage, 906;
may sue for specific performance, 965.
- Review, not of order in summary suit
by person dispossessed of immovable
property, 950.
- Revival of wills, 362, 364, 365; of re-
pealed enactments, 489; of ease-
ments, 887, 923.
- Revocable contract, 959, 961, and
note 8.
- Revocation, of will, 306, note 2, 357,
362, 363, 364; of grants of probate
or administration, 445, 446, 457; of
acceptance, 493; of proposal, 493;
of proposals and acceptances, 548,
549; of continuing guarantee, 613,
614; of agent's authority, 633, 634,
635; of continuing guarantee given
to a firm, 654; transfer operating as
a, 763; of gift, 811; of trust, 871;
extinction of easement by, 918; of
license, 925, 926; licensee's rights on,
926. *See* Marriage.
- 'Reward for doing,' 150.
- Rewards, to constables and seamen, 562,
note 1; for return of lost goods, 625.
- Riding, rash or negligent, 197.
- Right, of re-entry for right of condition
subsequent, 748; to sue for compen-
sation for fraud or harm, 749; of
occupancy, 803; in gross, 880, 895,
note 5.
- 'Right heirs,' bequest to, 373.
- Right of way, extent of, 912; declara-
tion that A is not entitled to, 978,
979; injunction to restrain suit for
obstructing alleged, 986.
- Rigorous imprisonment, 20, 25.
- Riot, assaulting public servant when
suppressing, 146; giving provocation
with intent to cause, 146; liabilities
of owner and his agents for whose
benefit riot is committed, 147; dis-
obedience causing, 162.
- Rioting, 144, 145. *See* Affray, Unlaw-
ful assembly.
- Rivers, conservancy of, 8; injuring
public, 258; right to enjoyment of
water of, 897, note 9. *See* Mischief.
- Road, injuring public, 258. *See* Mis-
chief.
- Road-cess, lien for, 530.
- Robbery, 59, 242, 243, 244, 245. *See*
Dacoity, Extortion, Private defence,
Theft.
- Rules, power to make, 486; of High
Court, 799.
- Rumours, circulating false, 291.
- Running account, mortgage to secure
balance of, 788.
- Rupee, when legal tender, 504.
- Sacred object, destroying etc., 202.
- Safety, injuring public, 194; rashness
or negligence endangering personal,
221; advancement of, 752. *See*
Adulteration, Infection, Navigation,
Nuisance, Riding, River.
- Sailor. *See* Assault, Desertion, In-
subordination, Mariner, Mutiny,
Punishment.
- Salary of public officer, inalienability
of, 749.
- Sale, of property bequeathed to several
in succession, 410; of stock specifically
bequeathed, 418; by executor or ad-
ministrator, 461; in execution of de-
crees, 511; for arrears of revenue, 511;
of the property of proclaimed persons,
511; defined, 510, 594; of goods,
594-610; warranty on, 607-609; by
auction, 610; pawnsee's right of, 627;
of immovable property, 729, 768-773;
of property subject to prior mortgage,
796; of actionable claim, 814; by
trustee directed to sell within speci-
fied time, 848; of trust-property, 855,
860; rescission of contract of, 975;
injunction to restrain, 984, 985. *See*
Adeemption, Alienation, Delivery,
Power of sale, Receipt, Registration,
Revenue, Sample, Title, War-
ranty.
- Salt, 7, 8.
- Salvage, 524, note 3.
- Sample, sale by, 607.
- Sanction of shareholders, directors' con-
tract without, 961.
- Sanitary regulation, 8.
- Sans recours, 691.
- Santal Parganas, 512 note.
- Sarais and puraoes, 7.
- Satisfaction, bequest in, 476; accept-
ance of, 582.
- Sattas, 659, note 1.
- Savings-bank, deposit of trust-funds in,
826, 848.
- Screening offender, 175, 176.
- Scrip, 659, and note 1.
- Sea-mark, exhibiting false, 197; de-
stroying, 259. *See* Mischief.
- Seal, making or possessing counterfeit,
273; probate and administration
granted under, 454, 455; instru-
ments under, 465; promises under,
506; not required to protest, 707,
note 1. *See* Forgery.
- Seamen, breach of contract by, 63;
wills of, 360, 361; wages and dis-
charge of, 519. *See* Sailor.
- Second offence, 113-114; cousins, 376.
- Secret process, injunction to restrain
disclosure of, 987.

- Secretary of State in Council 518, 782, 937, 981.
- Secreting documents to prevent their production as evidence, 171.
- 'Section,' 103, 489.
- Securities for money, 370, note 2.
- Security, given by residuary legatee, 472; surety entitled to benefit of creditor's, 617; protest for better, 706; insufficient, 780, 782; hazardous, 844; trustee's power to accept, 857. *See* Conditional sale, Hypothec, Lien, Mortgage, Pawn, Valuable security.
- Seduction, kidnapping woman for purpose of, 230.
- Selection, seller's right of, 597.
- Self-defence, 17.
- Self-preservation, 18.
- Seller, of goods, 595, 596, 598; selection by, 597; lien of, 601; of immovable property, duties of, 730, 769; rights of, 730, 770, 771. *See* Delivery, Latent defects, Resale, Rescission, Stoppage in transit, Warranty.
- Selling defamatory matter, 52; printed or engraved substance containing defamatory matter, 289.
- Sentence. *See* Commutation, Forfeiture, Punishment, Remission.
- Separate property, 572, note 3; of partner, 655.
- Separate use, gifts to, 751 and note 3; settlement to woman's, 290.
- Separation from husband, its effect on wife's domicile, 343; on widow's right to administer, 457.
- Sepoys, 552, note 1.
- Sepulture, trespass on place of, 32.
- Servant, possession of, 98; theft by, 239; criminal breach of trust by, 249; domicile of, 342; preferential payment of wages of, 464; damages for wrongful discharge of, 589, note; remunerated by share of profits of trade, 648; of the Queen, 92, 94. *See* Public servant.
- Service; criminal breach of contract of, 279, 280; of process, 172; contract of, 509. *See* Agency, Carriage, Deposit, Master and apprentice, Master and servant, Partnership, Professional service, Work on materials.
- Servient heritage, 894.
- Servient owner, cannot require continuance of easement, 922.
- Servitudes. *See* Easements.
- Servitus stillicidii, 914, note 5, 915, note 1.
- Set-off, of debts due to agent, 644; of profits against interest, not allowed to trustee, 850.
- Sets of bills, 663, 717.
- 'Settlement,' of minor's property on marriage, 354; barring widow of interest in husband's estate, 437; defined, 947; restrictions on power to make, 727; on marriage, specific performance of, 965; specific performance of testamentary directions to execute a, 972.
- Settlement of accounts, trustee's right to, 854.
- Sevasthān, 748, note 1.
- Severing agent's authority, 635; trusteeships, 870, note 3.
- Share, of profits, no test of partnership, 647; of mortgaged property, redemption of, 777.
- Shares, of a railway company, 370, note 2; specific performance of contract for sale of, 953; in companies, transfer of, 499.
- Shia law, 871, note 3.
- Ship, delivery of, 951, note 8; registry, 7.
- Shipmasters, 519.
- Shipowner. *See* Charterparty.
- Ships, destruction of, 7. *See* Passengers.
- Shooting, 312; causing hurt by, 217, 218.
- Short title, xxii.
- Shroffs, 673, note, 674.
- Sight. *See* After sight, At sight.
- Signature, of will, 358; authenticating alteration, 364; of note, 675; of bill, 676; of acceptance, 677; of indorsement, 679.
- Sikandarābād, 298.
- Sikhs, 295; wills of, 314.
- Silence, fraudulent, 555, 557; guarantee obtained by, 618.
- Simple homicide, 39.
- Simple imprisonment, 20, 25.
- Simple mortgage, 530, 774; sale under, 795.
- Simple mortgagee, 781.
- Sind Frontier, 8.
- Sisters, their right to intestate's property, 351.
- Skill required from agent, 637.
- Slave-trade, 5, 7, 231, note 2.
- Slavery, 47.
- Slaves, importing, buying, selling, etc., 231, 232. *See* Kidnapping.
- Slight harm, acts causing, 16, 17, 122.
- Sodomy, 234.
- Soldier, arms of, 7; wearing dress of, 142; privileged will of, 360; instructions for will of, 361. *See* Assault, Desertion, Insubordination, Mutiny, Punishment.
- Solemn affirmation, 103.
- Solicitor. *See* Lien.

- Solitary confinement, 20, 113. *See* Imprisonment.
- Solvency, warranty of, 531, 814.
- 'Son,' means a legitimate son, 377; includes adopted son, 489.
- Sound mind, for purpose of contracting, 553.
- Sovereign. *See* Queen.
- Special indorsement. *See* Indorsement in full.
- 'Special law,' 102.
- Special laws, 102; saved by Penal Code, 6, 92.
- Special liens, 529.
- Special purposes, grant of probate or administration for, 441-443.
- Specialty debt not preferred in India, 465.
- Specific execution, beneficiary's right to, 861.
- Specific legacies, 407-410, 409, note 3; ademption of, 414-418; rateable abatement of, 467; produce of, 475.
- Specific performance of contracts, 952-972; contracts specifically enforceable, 952-958; contracts not specifically enforceable, 958-962; discretion of Court as to decreeing, 962-965; who may obtain, 965, 966; who cannot obtain, 966-968; who cannot obtain except with a variation, 968-970; against whom contracts may be specifically enforced, 970, 971; against whom contracts cannot be specifically enforced, 971, 972; effect of dismissing a suit for, 972; of rectified contract, 974.
- Specific relief, how given, 947, 948.
- Specific Relief Act, 945-991; Introduction to, 928, 940.
- Specific remedy, 920.
- Spirits, 8. *See* Excise.
- Spring or reservoir, fouling water of, 196.
- Stabbing, 217, 218.
- 'Stage of a judicial proceeding,' 166.
- Stage-carriages, liability of proprietor of, 517.
- Stamps, 7; offences relating to, 31, 32; on negotiable instruments, 664; on lost note, etc., presumption as to, 713. *See* Government stamp.
- State. *See* Command.
- State-offences, 7, 27, 28, 136-139, and Arrangement of sections, pp. 77, 78.
- State-prisoners, 7, 28, note 1; allowing escape of, 138, 139; aiding escape of, 139; rescuing or harbouring, 139.
- Status, declarations of, 978.
- Statute of Frauds, sec. 5, 6, 12, 19-22, 298, note 1; secs. 1, 2, 3, 4 and 7 repealed by Contract Act, 656.
- Steam-vessels, inland, 7; survey of, 8, 9, 10.
- Stipends to Government pensioners, 749.
- Stock, ademption of bequests of, 415, 416.
- Stock in company, exoneration of specific bequest of, 420.
- Stock on farm, 370, note 2.
- Stocks, confinement in, 23, note 2.
- 'Stolen property,' 250; dishonestly receiving, 250, 251; habitually dealing in, 251; assisting to conceal, 251. *See* Receiving.
- Stoppage in transit, 602, 605.
- Straits Settlement, 91, note 3.
- Stridhana, 553, note 1, 572, note 3.
- Striking out indorsement, 685-6.
- Sub-agents, 631, 632; termination of their authority, 636.
- Sub-leases, 736, 803, and note 1.
- Sub-partnership, 651, note 7.
- Sub-pledge, 628.
- Subscription, promise to pay, 1033.
- Subsequent, buyer, lien against, 602; condition, 756; incumbrancer, 779-780; mortgagee, 785.
- Substituted contract, discharge by, 502.
- Subterraneous channels, 897, note 6.
- Succession, to immoveable property in British India, 341; to moveable property wherever situate, 341; in British India, 343; bequest to two or more in, 410.
- Succession Act, Indian, 337-484; Introduction to, 297-322.
- Successors of functionaries or corporations, 490.
- Suicide, 209; abetting suicide of child, lunatic, idiot or intoxicated person, 211; of others, 306; attempt to commit, 213.
- Suit, for administration, 794; for execution of trust, 862; injunction to restrain, 986.
- Sum payable under bill etc., certainty as to, 676; stated differently in figures and in words, 679; in case of blank acceptances etc., 679, 680.
- Summons. *See* Absconding.
- Sunday, 681.
- Superstitious uses, 390, note 4, 839, note 6; use, 839, note 6.
- Supplemental grants, 444 (sec. 231), 1033.
- Supplying words, 367.
- Support, 912, note 1; prescriptive right to, 883; right to, 897; compensation for removal of, 916; injunction to prevent removal of, 986.
- Surety, to administration bond, 256;

- may recover payments made on behalf of principal, 573; defined, 612; liability of, 612; death of, 614; discharge of, 614, 615, 616; rights of, 617; in case of note, bill or cheque, 684, 685; discharge of, 685; for payment of mortgaged debt, 794. *See* Guarantee.
- Suretyship, 525-527; in case of note etc., 685.
- Surprise, 968, note 5, 972.
- Surrender of lessee's interest, 806, 807; one executor can make, 461; of easements, 885.
- Survival of rights of action, 268 and note 3, 460; of powers of several executors or administrators, 462; of trust, 870.
- Survivor of joint promisees, 574.
- Survivorship, 396 and note 3; in case of bequest to two persons jointly, 381; to described class, 382, 383; of representation of testator, 434-5.
- Suspension of civil remedy for wrong amounting to felony, 18; of gift, 811; of trustee's powers by decree, 858; of easements, 887, 922; of enjoyment of easement, 905; from practice, 1031.
- Swear, 489.
- Table of consanguinity, 346.
- Tacking abolished, 789.
- Tanks, right to take fish or water from, 235, note 5, 879, 895, 1032.
- Tearing, revocation of will by, 364.
- Technical words, 366.
- Telegraph, 7; officers, 97, note.
- Temporary, Acts, 486; injunctions, 937, 983.
- Tenant, by the courtesy, 296; by dower, 296; for life entitled to title-deeds, 950; under a lease, *see* Lessee; injunction against, 985.
- Tender, 594; discharge by, 503, 504; of money, 504; right to redeem on, 776; to agent, 798.
- Tenor, executor according to the, 433.
- Tent, theft in, 238; criminal trespass by entering, 261.
- Termination of agency, 633-636.
- Terms of art, 366.
- Territorial Waters Jurisdiction Act, 6.
- Testamentary document, 100. *See* Will.
- Testamentary guardian, 242, 356 and note 1, 1032.
- Testamentary papers, production of, 447.
- Theft, 54, 57, 235-239, 242. *See* Dacoity, Extortion, Robbery, Thieves.
- Thellusson Act, 389, note 2.
- Thieves, belonging to gang of, 245.
- 'Thing made punishable,' 102, note 1.
- Third person, accepting performance of promise from, 572; claiming goods bailed, 625.
- Threat, compulsion by, 121; to induce abstention from applying to public servant, 163; of injury to public servant, 163; will caused by, 356. *See* Coercion, Extortion, Intimidation.
- Thuggee, 44, 213.
- Thugs, 65, 213.
- Tidal waters, exclusive right to take fish out of, 895, note 3.
- Tiled huts, 801, note 3.
- Timber, lessee must not fell, 804; trustee's power to thin, 855, note 1.
- Time, commencement and termination of, 489; for performance of promise, 574, 575; when essence of contract, 505, 578 and note 2; extension of, 582; surety discharged by contract to give, 616; for payment of note or bill not specifying, 679; of acceptance of bill, presumption as to, 713; of transfer of negotiable instrument, presumption as to, 713. *See* Holidays, Reasonable time.
- Time-barred debts, 552, 562; promise to pay, 562.
- Time-tables, announcements in, 493, note 2.
- Title, to thing bequeathed, completing testator's, 420; warranty of, 530, 531; conveyed by seller of goods to buyer, 605, 606; seller's responsibility for badness of, 607, 769; mortgagor's, 779; lessor's, 801; of party seeking to redeem, 794; to trust property, trustee to protect, 844; trustee not to set up adverse, 844; vendor or lessor of property to which he knows he has no, 967; not free from reasonable doubt, 967. *See* Bailment, Short title.
- Title-deeds, mortgage by deposit of, 732; production of, 769; delivery of, 770, 795; power to call for, 818; trustee's right to custody of, 852; tenant for life's right to, 950.
- Tolls on Ganges, 9.
- Tort, executor de son, 458. *See* Actionable wrongs.
- Torture, 45, 218, 219.
- Trade, public servant unlawfully engaging in, 153 and note 3; agreement in restraint of, 523, 563, 564.
- Trade-marks, using false, 61, 275; counterfeiting, 61, 276; selling goods marked with false, 61, 277; injunc-

- tion to prevent invasion of right to, 984; injunction to restrain improper user of, 937, note 1, 987. *See* Forgery, Mark, Property-mark, and Arrangement of sections, p. 88.
- Tramways, 8, 9; carriers by, 515.
- Transfer, of partner's interest as such, 652 and note 6; of note, bill or cheque, 678; by act of parties, 726-729; pendente lite, 729, 766; of property, 748; persons competent to make, 749; operation of, 750; oral, 750; for benefit of unborn, 751; for benefit of public, 752; to a class, 754; conditional, 754-757; by ostensible owner, 762; by one co-owner, 763, and see Contents, p. 741; by lessee, 803; of actionable claims, 813; of trust-property to beneficiary, 861; of easements, 907. *See* Assignment, Exchange, Gift, Negotiation, Sale.
- Transfer of Property Act, 745-816; Introduction to, 726-739.
- Transferee, his right under fire-policy, 765; rights of lessor's, 804, 805; with notice, specific performance enforced against, 971.
- Translation of will, 451.
- Translator, 165. *See* Evidence.
- Transportation, 19, 25, 107, 108; unlawful return from, 183; wife's domicile, how affected by husband's, 343.
- Transportation for life, abetting offence punishable with, 132; concealing such offence, 134; giving false evidence to procure conviction of offence punishable with, 167, 168; murder by person sentenced to, 210; attempt to murder by person sentenced to, 212. *See* Punishment.
- Treason, 136, note 4.
- Treasure-trove, 7, 533, 586, note 4.
- Trespass, 60; by co-owner in possession, 202, note 6; landlord's suit in, 522; possession acquired by, 949, note 1; injunction to restrain, 986. *See* Criminal trespass, Sepulture.
- Trivial offences, 17, 122 and note 1.
- Trust, defined, 838, 946; annexed to donation mortis causa, 431, note 6; contract to create, 514; creation of, 839-842; specific performance of act agreed to be done in execution of, 952. *See* Breach of trust, Petition.
- Trust-property, defined, 838; lease of, 855, 860. *See* Loan, Minor, Perishable, Savings-bank.
- Trustee, defined, 838, 946; his charge on trust-property for expenses, 798; duties and liabilities of, 843-852; rights and powers of, 852-858; disabilities of, 859, 860; proper person to be, 862; vacating office of, 868-870; contract improperly made by, 959; injunction against, 984. *See* Breach of trust, Insolvent, Interest, Profit, Receipt, Sale, Suspension, Waste.
- Trusts Act, 1882, 837-878.
- Ultior transfer, 756.
- Ultra vires, 897, note 2; contracts, 959, 962; injunction to restrain acts, 984.
- Unascertained goods, sale of, 595.
- Unauthorized act, ratifying, 633; person, transfer by, 763.
- Unborn person, 751, 752; bequest to, 307.
- Uncertainty, will void for, 372; agreements void for, 565; declaration that covenant is void for, 979.
- Unconscionable agreement, 498.
- Underground water, 907.
- Under-lease, 736; effect of surrender and forfeiture upon, 807, 808.
- Under-tenant, lien of, 530.
- Under-writer, 520.
- Undisclosed agent, 644.
- Undisclosed principal, 643; liability of, 645.
- Undivided family, 831; injunction against member of, 985.
- Undue advantage, 971.
- Undue influence, 494, 554; advantage gained by exercise of, 875, 946. *See* Illness.
- Unfair advantage, 962; practices, 971.
- Unfinished goods, sale of, 595.
- Unity of ownership, extinction of easements by, 920.
- Unity of persons, 296.
- Universal gifts, 737, 812.
- Universal legatee, grant of administration with will annexed to, 436.
- Universal succession, 295 and note 1.
- Unlawful assembly, 143-148; liability of owner of land on which it is held, 146, 147. *See* Hiring, Rioting.
- Unlawful consideration, 693; contract, 975. *See* Illegal.
- Unmade goods, sale of, 595.
- Unnatural offences, 34, 234.
- Unsound mind, acts of person of, 117 and note 2; acts done in good faith for benefit of, 118. *See* Idiot, Insanity, Lunatic.
- Upper Burma, 1031.
- Usage, as to hundis, 673; of trade, 546.
- Useless easement, extinction of, 919.
- User of easements, 883, 884; of trade-mark, 987.
- 'Using criminal force,' 224, 225, 226, 227, 228.

- 'Using force,' 224.
 Using stamp previously used, 191.
 Usual hours of business, 695.
 Usufructuary mortgage, defined, 775, 780, sale under, in redemption suit, 795; mortgagee, 775, 781; mortgagor's right to possession, 777; his suit for redemption, 794; order for sale, 795.
 Usury laws, 512.
 Utensils, 370, note 2.
 Uttering counterfeit coin, 186.
 Vaccination, 8, 9, 10.
 Vagrancy. *See* European vagrancy.
 Vakils. *See* Pleaders, Publication.
 'Valuable security,' 99 and note 2, 254; forgery of, 272; possessing counterfeit seal with intent to forge, 273; known to be forged, possessing with intent to use as genuine, 274; fraudulently cancelling, 276. *See* Forgery.
 Valuation, contract to sell land at a fair, 959, note 1.
 Value, consideration must have some, 497.
 Valuing annuities, 425, note 2.
 Variation, specific enforcement of contract with, 968-970.
 Varying terms of contract discharges surety, 614; way of necessity, 882; investments of trust funds, 856.
 Ventre sa mère, child in, 377.
 Verification, of translation of will, 451; of petition for probate, 452.
 'Vessel,' 103; rash or negligently navigating, 197; conveying persons in over-loaded or unsafe, 197; theft in, 238; mischief to, 260; running aground with intent, 260; criminal trespass by entering, 261. *See* Navigation.
 Vested interest, 753.
 Vesting of legacies, 391-394; of trust-property, 870.
 Vibration, right to freedom from, 897.
 Violence, imputation intended to excite mob to, 52.
 Violence to the person, 39.
 Vis major, 697, note 4, 735, 736, 782, 802, 803; alteration of servient heritage by, 919. *See* Act of God.
 Vivum vadium. *See* Usufructuary mortgage.
 Void agreement, 547; where both parties under mistake of fact, 557; where object or consideration unlawful, 559-560; in part, 561; where no consideration, 561; in restraint of marriage, 563, of trade, 564, of legal proceedings, 565; where meaning uncertain, 565; by way of wager, 566; to do impossible act, 579; receipt of advantage under, 583. *See* Consideration, Contract.
 Void bequests, 307, 385-390.
 Void contract, 547.
 Voidable contract, 547, 558; caused by coercion, undue influence, fraud or misrepresentation, 556; where party refuses to perform promise, 571; in case of reciprocal promises, 577; where time is of essence, 578; consequences of rescinding, 583; communicating or revoking rescission of, 584; contract of bailment when a, 622; suit for rescission of, 974.
 'Voluntarily,' 101; causing hurt, 216, 217, 218, 220; grievous hurt, 218, 219, 220.
 Voluntary, bonds and promissory notes, 465, note 3; settlement, 931-2, 966, 967, 968.
 Voluntary alienee, specific performance against, 970, note 3; settlor, non-enforcement of contract of sale or lease in favour of, 967; injunction against, 985.
 Volunteer corps, 7.
 Wagers, 509, 523 and note 2, 566.
 Wages, paid preferentially, 404; summary jurisdiction in disputes as to, 517; of shipmaster, 524.
 Waging war against Queen, 136; conspiracy for, 136; preparing for, 137; concealing design of, 137; against ally, 138.
 Waiver, of enquiry, 430, 759; discharge by, 501, 502; of holder's rights, 502; of presentment for payment, 697; of protest, 711; of forfeiture of lease, 736, 806, 807; of notice to quit, 807.
 Want, of skill, compensation to agent for injury caused by principal's, 641; of consideration, 686, 687.
 'Wantonly,' 11, 146.
 Waqf, 748, note 1, 831, 978, note 2.
 War, causing dissolution of partnership, 653, note 2. *See* Prisoner of war, Waging war.
 Ward of Court of Wards, legacy to, 473-4. *See* Minor.
 Warehouse-keeper, criminal breach of trust by, 249; contract by, 514; certificate of, 605. *See* Mischief.
 Warrant, 509, 513, 530, 531; of title, 607; of goodness or quality, 607; of soundness of provisions, 607; on sale by sample, 607; when goods are sold of a certain denomination, 607; when

- goods are ordered for specified purpose, 608; on sale of article of well-known ascertained kind, 608; buyer's right on breach of, 609; of solvency of debtor, 814; of agent's authority, 495.
- Waste, mortgagor's liability for, 732; by mortgagor in possession, 780; by mortgagee in possession, 787; by lessee, 804; trustee to prevent active, 846; by intended lessee, 967; by Hindú widow, 985; by member of an undivided family, 985.
- Water, fouling, 196; wrongfully diverting, 258; right to take, 879, 895; natural right to, 897. *See* Lakes, Ponds, Rivers.
- Way of necessity, 882; direction of, 903.
- Weights and measures, 7; offences relating to, 32, 193.
- Welsh mortgage. *See* Usufructuary mortgage.
- Wharfinger, 514; criminal breach of trust by, 249; contract by, 514; delivery to, 600; certificate of, 605; lien of, 626.
- Whipping, 18, 23.
- Whipping Act, 104-107, note.
- Whole blood, 300.
- Widow, her right to property of intestate husband, 300; excluded by antenuptial contract, 347; her share of intestate husband's property, 348; grant of administration to, 437, 438; of partner receiving annuity out of profits of partnership, 648. *See* Remarriage, Settlement.
- Widow-burning, 8, 9.
- Widower, rights of, to intestate wife's property, 300, 354; grant of administration to, 438.
- Wife, harbouring husband, 141, 175, 178; domicile of, 343 and notes 3, 4 and 5; may bequeath what she might have transferred, 355; of attesting witness, bequest to, 362; grant of probate or administration to, 434, 435; devastated by, 304. *See* Adultery, Bigamy, Married woman, Transportation.
- Wild animals, 257, note 7, 1032.
- 'Will,' 100, 338, 489; fraudulent destruction of, 61, 275; forgery of, 272; possessing forged will with intent, &c., 274; persons capable of making, 355; obtained by fraud, etc., 356; execution of, 358; privileged, 360; attestation of, 363; revocation of, 357, 362, 363, 364; alteration of, 357, 364; revival of, 364, 365; construction of, 366-384; lost, 439. *See* Administration, Attestation, Bequest, Executor, Forgery, Idiot, Importunity, Probate.
- Will-making, origin of, 301.
- Wills Act, 298 and note 1.
- Winding up company, 517; partnership, 655.
- Windows, 750.
- Without grace, bill drawn payable, 680, note 2.
- 'Without recourse,' indorsement, 652.
- Witnesses, to will, 358, 362; to mortgage, 775. *See* Evidence, Perjury.
- 'Woman,' 93. *See* Abduction, Adultery, Insult, Marriage, Married woman, Miscarriage, Modesty, Pregnant, Rape, Seduction.
- Womb, child in, 377.
- Wording of Codes, xxiii.
- Words, supplying, 367; re-occurring in same will, 371.
- Working on materials bailed, 509, 515.
- Workmen, breach of contract by, 63.
- Worship, assemblies held for, 32; destroying etc. place of, 202; trespassing on place of, 202.
- Writing, contracts required to be made in, 552 and note 1, 675, 676.
- Wrong, executor of his own, 458; trustee must not profit by his own, 826. *See* Actionable wrongs.
- Wrongdoers, suit by bailor or bailee against, 628.
- Wrongful confinement, 45, 46, 221, 222, 223, 224; assault in attempting, 228.
- Wrongful detention, 98.
- 'Wrongful gain,' 97.
- 'Wrongful loss,' 97, 98. *See* Cheating, Mischief.
- Wrongful restraint, 45, 46, 221, 222.
- 'Wrongful retention,' 98.
- 'Year,' 103, 487.
- Zanzibar, 3, note 1, 298.

ADDENDA.

- P. 1, l. 13, *after* person *insert* the section relating to Bestiality is placed in the chapter headed 'Of Offences against the Human Body': the law as to circulating false rumours with intent to cause a mutiny is in the chapter on 'Criminal Intimidation, Insult and Annoyance,' instead of the chapter on offences relating to the Army.
- P. 7, col. 2, l. 41, *insert* Tramways (XI of 1886).
- P. 10, col. 2, l. 4, *insert* Upper Burma Laws Act (XX of 1886).
- P. 23, note 1, *add* Pleaders and Mukhtyars may be suspended from practice or dismissed under Act XVIII of 1879, secs. 12-15, 26, 33, 34, 39, 40, Pleaders under Bom. Reg. II of 1827, secs. 50, 51, 54, and (in Sind) Bom. Act XII of 1866, s. 16. As to the power of Colonial Courts to suspend advocates, see 1 Knapp, 267, per Lord Wynford. So with advocates under the Roman law, Dig. 48. 19. 9. pr. As to the *mala praxis* justifying suspension, Newton's case, 14 Moore, L. A. 267.
- P. 23, note 3, *add* As to Lower Burma, see Act XVI of 1886, sec. 6. As to Upper Burma, exclusive of the Shan States, see Act XX of 1886, sec. 7, and Sched. III.
- P. 30, l. 36, *insert* As to the offences which in England are called 'contempts of Court' the Code is silent, except when the insult or interruption is offered or caused in the face of the Court and in a stage of a judicial proceeding (s. 228). The High Courts in the Presidencies are superior Courts of Record, and as such possess a summary jurisdiction to cause the offender to be instantly apprehended and imprisoned at the judge's discretion, without any further proof or examination; see 8 Suth. Cr. 32: 4 Cal. 655: 7 Bom. 1: 7 Bom. H. C., O. C. J. 172, and the judgments of Peacock C.J. in William Tayler's case, (Calcutta, Office of the Superintendent of Government Printing, 1869). In Surendra Nath Banerjea's case, L. R., 10 I. A. 171, the Judicial Committee upheld this jurisdiction in case of a libel published out of Court when the Court was not sitting. As to the powers of Presidency Small Cause Courts to deal with contempts, see Act XV of 1882, secs. 83-88. As to Mufassal Courts, 11 Beng. Appx. 37, 39: 2 Beng. A. C. J. 188: 2 Mad. H. C. 319. For the English law, see Archbold, 754.
- P. 36, l. 16, *after* Adultery *insert* is certainly a breach of one of those laws of conduct most needful for social concord¹; and it seems strange that it
- P. 37, note 4, *add* As to such marriages between Roman Catholics see the recent case of *Lopez v. Lopez*, 12 Cal. 706.
- P. 37, note 5, *add* That under the canon law marriages are invalid when the wife has not completed her age of twelve years, see André, *Droit Canonique*, s. v. Impuissance.
- P. 70, note 3, *add* And see 3 Mad. H. C. 8, per Holloway J.: 'A barbarous code of penal laws was the parent of these doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too.'

¹ Spencer, *Eccl. Institutions*, 814.

- P. 95, sec. 21. A man may be a 'public servant' though he receives no pay, 8 All. 201.
- P. 103, note 5, *add* See further, *Lang v. Gubbins*, Tayl. & B. 228, per Peel C.J.
- P. 114, note 4, *add* And see as to the section, 9 Mad. 284-5.
- P. 117, note 2, *add* And see 10 Bom. 512.
- P. 151, note 3, *add* *infra*, p. 814.
- P. 159, sec. 179, see 10 Bom. 185.
- P. 170, notes, col. 1, line 4, *after* 7 All. 749 *insert* 8 All. 252.
- P. 178, note 4, *add* See also 8 All. 653.
- P. 194, note 11, *add* But West J. has recently ruled the contrary, 11 Bom. 59.
- P. 207, note 2, l. 2, *after* wife *insert* And see 8 All. 622, 631.
- P. 214, line 4, as to the meaning of 'quick with child' see 9 Mad. 369, where the learned judges seem to have overlooked the word 'quick.' As to this see *Rez v. Phillips*, 3 Campb. 76, 77.
- P. 235, notes, col. 2, l. 11, *after* 390, *insert* otherwise where the fish are in an enclosed tank, 10 Bom. 193.
- P. 248, note 3, *add* Where the breach is committed by a temple-trustee, the ordinary criminal law is not excluded by Reg. VII of 1817 or Act XX of 1863.
- P. 256, sec. 425. See 12 Cal. 660, where it was held that the damage contemplated in this section need not necessarily consist in the infringement of an existing, present and complete right; but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence.
- P. 257, note 7, line 3. See 4 Mad. 268, the case of a wild elephant fallen into a pit dug by A in his own land.
- P. 258, sec. 430. See 10 Bom. 183.
- P. 269, note 6. See more as to fraudulent alteration, 9 Mad. 399, following 3 Mad. H. C. 247.
- P. 289, sec. 500. See 9 Mad. 387, and Act XXV of 1867, sec. 7. The English Statute 6 & 7 Vic. c. 96 does not apply to India, 9 Mad. 387.
- P. 295, note 4. For other cases as to the law applicable to Páráis see 3 Bom. H. C., A. C. J. 113, 115 (marriage): 4 Bom. 537 (succession *ab intestato*): 5 Bom. 268 (gifts to separate use of women), 506 ('justice, equity, and good conscience'): 6 Bom. 151 (non-application of rule in Shelley's Case), 363 (resulting trusts).
- P. 316, note 2. As to the legal status of a Hindú administrator, see 8 Bom. H. C., O. C. J. 140.
- P. 317, l. 11. Since the passing of Act V of 1881 the District Courts (in the territories to which it applies) have jurisdiction to grant probate or letters of administration in respect of wills of Hindús made *before* 1 Sept. 1870, i.e. wills to which the Hindú Wills Act did not apply, 14 Calc. 37.
- P. 318, note 1. Acts V and VI of 1881 have been extended to the Haidarábád Assigned Districts, see *Gazette of India*, 5th Nov. 1881, Part I, p. 540.
- P. 356, sec. 47. As words importing the male sex include females (p. 337), this section enables a mother to appoint a testamentary guardian.
- P. 383, note 1, *add* As to gifts to a class, see 12 Cal. 663, questioning the decisions reported in 2 Cal. 262 and 4 Cal. 455.

- P. 444, note 6, *add* A supplemental grant, or as it is commonly called, a *cessate* grant, is distinguished from a grant *de bonis non* as being a regrant of the whole of the deceased's personal [and, in India, real] estate as it was embraced in the original grant, Coote, Prob. 176.
- P. 483, note 1, col. 1, l. 16, *after* Christianity *insert* (9 Mad. 466).
- P. 486. Several of the suggestions here made have been skilfully carried out in Act I of 1887 (*For further shortening the language used in Acts of the Governor-General in Council, and for other purposes*).
- P. 489, sec. 3, cl. (1), *before* repealed *insert* wholly or partially¹.
- P. 489, notes, col. 2, l. 7, *after* 137 *insert* the right to reserve a fixed annual allowance out of the revenues of a temple, 10 Bom. 149.
- P. 498, note 1, *add* 9 All. 74.
- P. 510, l. 20 et seq. That payment of wages in liquor is not a sale, see 9 Mad. 141.
- P. 513, note 3, *add* and the Specific Relief Act, sec. 21, last illustration to clause (a).
- P. 516, notes, col. 2, l. 1, *after* 140 *insert* 9 Mad. 141.
- P. 517, notes, col. 2, l. 1, *after* companies *insert* 10 Bom. 211.
- P. 521, l. 10, *after* right *insert* unless perhaps by sec. 70.
- P. 527, note 7, *before* Code *insert* Contract Act, sec. 145.
- P. 528, l. 18. As to agreements to mortgage future moveable property, see 13 Cal. 262. As to mortgages of debts, see the Transfer of Property Act, sec. 138.
- P. 533. That the obligation arising from a foreign judgment belongs to the class of *quasi-contracts*, see 6 Bom. 292, 294.
- P. 545, note 3, as to sec. 17 of 21 Geo. III, c. 70, see 5 Cal. 688.
- P. 546, note 1, *add* 7 Moo. I. A. 263; 12 *ibid.* 361.
- P. 546, note 6, *add* Where *A* promised *B* to subscribe to the erection of a town-hall, and *B* on the faith of the subscriptions of *A* and others contracted with *C* to erect the hall, held that *B* might sue *A* for his subscription, 14 Cal. 64.
- P. 554, note 1, see 1 Cal. 330.
- P. 555, notes, col. 2, *after* l. 11 *insert* For a case in which the Court upheld an agreement between an attorney and his client see 3 Cal. 473.
- P. 563, note 1, *add* and see 3 Cal. 192; 4 Cal. 137. More as to unconscionable bargains, 12 Cal. 225.
- P. 579, notes, col. 1. That in cases of rescission time is of the essence, see 6 Cal. 64.
- P. 581, sec. 60: as to 'other circumstances' see 13 Cal. 164, 168.
- P. 583, sec. 65, see 9 Mad. 444.
- P. 584, note 4, *add* So in the Code of Criminal Procedure, sec. 488.
- P. 592, sec. 74, Exception, see 13 Cal. 200. Note 2, *add* 9 All. 74.
- P. 594, note 4, l. 9, *after* Hindus *insert* 10 Cal. 588.
- P. 601, note 2, *add* as where the goods are sold on credit, or collateral security is taken for the price.
- P. 616, note 2, *add*, and see 8 All. 259.
- P. 638, sec. 213, see 6 Cal. 754, where Field J. held that an agent did not discharge this duty by merely delivering written accounts without attending to explain them and produce the vouchers. To enable the agent

¹ Act I of 1887, sec. 9.

to produce his accounts the principal must give him reasonable access to such books and papers in the principal's possession as may be necessary for that purpose, *ibid*.

P. 651, note 1, *add* see sec. 251 *supra*.

P. 653, note 2, l. 1, *after* or *insert* by a law rendering it illegal.

P. 655, note 2. That the retirement of a dormant partner is an exception to the rule that a partner's agency ends by notice, see 9 *Mad.* 494.

P. 659, note 2, *add* On the construction of bills of lading, see 4 *Cal.* 736, 5 *Cal.* 477.

P. 673, note 3, col. 2, l. 6, *after* 346 *insert* in the Panjáb, Boulnois and Rattigan's *Notes*, p. 260: Rattigan, *Digest*, p. 85.

P. 679, note 2, *add* Indorsements on allonges to Government securities are rendered ineffective by Act XIII of 1886, sec. 6.

P. 731, note 2, *add* As to those of the Panjáb, see Tupper's *Punjab Customary Law* (Calcutta 1881), lli. 217-244. Act IV of 1872, sec. 13, Act XII of 1878, sec. 2, and Rattigan's *Digest*, p. 30.

P. 775, note 7. That there must be a debt existing at the time of the deposit, see 10 *Bom.* 634, 644.

P. 781, sec. 67, cl. (d), see 9 *All.* 73, where Edge C.J. said that this clause merely declared the previous law.

P. 791, note 2, *add* 10 *Bom.* 648: 9 *All.* 125.

P. 794. As to the right of one of several joint mortgagors to redeem the whole estate, see 10 *Bom.* 648.

P. 877, note 1, *add* See as to such absentees, Rattigan, *Digest*, 77, 78.

P. 888, l. 21, *after* 117 *insert* and in the Specific Relief Act, sec. 20, ill.

CORRIGENDA.

- P. 1. l. 3, *for three read four.*
- P. 1. l. 4, *for and VIII of 1882 read VIII of 1882 and X of 1886.*
- P. 7, col. 2, l. 19, *for VIII of 1881, read XII of 1886.*
- P. 36, l. 17, *for It seems to me, says read Ancient English lawgivers can hardly have anticipated the opinion of*
- P. 53, note 2, l. 2, *for gesellschaft read Gesellschaft.*
- P. 91, l. 8, *for and VIII of 1882 read VIII of 1882 and X of 1886.*
- P. 270, ill. (d), l. 6, *for commits read commits.*
- P. 274, marginal note to sec. 474, *for 'valuable security or will read document.*
- P. 313, l. 16, *omit 'lately.'*
- P. 485, l. 3, *for and read &.*
- P. 509, § 7 a, *for Wages read Wagers.*
- P. 516, l. 28, *for him in read him, is.*
- P. 527, note 6, l. 1, *for 145 read 124.*
- P. 529, l. 4, *for pawnor read pawnee: l. 8, for or read on.*
- P. 552, notes, col. 1, l. 8, *transfer 'companies' to line 10, after '75.'*
- P. 552, notes, col. 2, l. 12, *for expl. read excep.*
- P. 560, notes, col. 1, lines 1-3. *'That ... 480' should be transferred to the beginning of note 3, p. 561.*
- P. 560, notes, col. 1, lines 10-14, *'As ... 83' should be transferred to p. 559 and inserted in note 3, line 11, after '33.'*
- P. 588, note 1, l. 1, *for uit read suit.*
- P. 955, notes, col. 2, l. 3, *for Balmarino read Balmanno.*



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